BRB No. 92-1209

RICHARD SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry, III (Pierry & Moorhead), Wilmington, California, for claimant.

Enrique M. Vassallo and Tim Keller (Mullen & Filippi), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-746) of Administrative Law Judge Alfred Lindeman awarding benefits 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 low back and left leg on March 5, 1985, during the course of his employment for employer as a marine electrician. On June 25, 1985, he underwent a laminectomy at L4-5 to repair a herniated disc, and a foraminotomy of the nerve roots at L5-S1. Claimant returned to work for employer in April 1986; however, due to his back condition, claimant quit work in March 1988. Employer voluntarily paid claimant medical benefits and weekly compensation payments of $513.65 for temporary total disability, 33 U.S.C. §§907, 908(b), from March 28, 1985, to April 13, 1986, and from March 22, 1988, to March 17, 1989; thereafter, employer voluntarily paid weekly compensation payments of $338.18 for partial disability, based on a loss of wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Claimant controverted the reduction in compensation and contended that since March 18, 1989, he is entitled to continuing compensation for permanent total disability pursuant to 33 U.S.C. §908(a).

In his Decision and Order, the administrative law judge credited the opinion of claimant's treating physician, Dr. London, and the opinion of Dr. Massell to find that claimant is unable to return to his usual employment duties with employer as a marine electrician due to his work injury. He next found that employer identified several job openings consistent with the work restrictions imposed on claimant by Dr. London, and that employer thus established the availability of suitable alternate employment. Finally, the administrative law judge credited evidence that claimant conducted a diligent, yet unsuccessful, job search, and found that none of employer's alternate employment opportunities was realistically available to claimant. Accordingly, claimant was awarded benefits for permanent total disability from March 22, 1988.[1]

On appeal, employer challenges the administrative law judge's finding that claimant exercised due diligence in seeking alternate employment and that he rebutted employer's evidence of suitable alternate employment. Claimant responds, urging affirmance.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, it is uncontroverted that claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, has stated that a claimant's diligent yet unsuccessful job search may be used to rebut an employer's evidence of the availability of suitable alternate work, thus entitling claimant to total

[1]The administrative law judge also found that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

disability benefits. *Edwards v. Director, OWCP*, 999 F. 2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

In the instant case, the administrative law judge's findings that claimant is unable to return to his usual employment as a marine electrician, and that employer established the availability of suitable alternate employment, are not challenged on appeal. Rather, employer contends only that the administrative law judge erred in finding that claimant conducted a diligent, yet unsuccessful, job search, which rebutted employer's evidence of the availability of suitable alternate employment. In rendering this finding, the administrative law judge credited claimant's testimony regarding his desire to work and to obtain health insurance coverage and the unavailability of the prospective jobs found by employer. The administrative law judge also credited evidence that claimant was cooperative with employer's vocational counselor, and he noted that prospective employers reported to the vocational counselor that claimant exhibited a good attitude. Finally, the administrative law judge noted that employer did not notify claimant of numerous suitable employment opportunities it identified in 1988, 1989 and 1991.

In challenging the administrative law judge's conclusion that claimant conducted a diligent, yet unsuccessful, job search, employer contends that the evidence and testimony provide substantial evidence that claimant's job search was less than diligent. It is well-established, however, that, as the administrative law judge is entitled to evaluate the credibility of all witnesses, he may draw his own inferences and conclusions from the evidence. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In the instant case, claimant's testimony that he wished to find employment and that he unsuccessfully sought employment with over ten employers is uncontroverted by employer. *See* Transcript at 146-151; Employer's brief at 10. Moreover, employer's vocational expert testified that claimant cooperated with her efforts to place him in a job. *See* Transcript at 101; Employer's Exhibits 21-23, 25. In this case, the administrative law judge's decision to credit claimant's testimony and evidence that claimant conducted a diligent, yet unsuccessful, job search is rational and within his authority as factfinder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Accordingly, we affirm the administrative law judge's conclusion in this regard, as it is rational and supported by substantial evidence, and his consequent award of compensation for permanent total disability.[2] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

[2]We note that as employer is not required to place an employee in suitable alternate employment, the fact that claimant and his counsel were not informed of the positions identified by employer's vocational expert is irrelevant to the issue of whether claimant diligently sought employment. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). In the instant case, although the administrative law judge found that claimant had not received notice of such positions, his ultimate determination that claimant diligently sought employment is supported by substantial evidence; thus, any error committed by the administrative law judge in this regard is harmless.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge