BRB No. 07-0846

J.V. Claimant-Petitioner v. CERES MARINE TERMINALS, INCORPORATED Self-Insured Employer-Respondent	)))))))))))	 DATE ISSUED: 06/17/2008 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits in Part and Denying Benefits in Part and the Order Denying Claimant's Petition for Reconsideration of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw L.L.P.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Awarding Benefits in Part and Denying Benefits in Part and the Order Denying Claimant's Petition for Reconsideration of the Decision and Order (2006-LHC-0749) of Administrative Law Judge Alan L. Bergstrom 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 and employer stipulated that claimant sustained a right shoulder injury on July 6, 2004, while working as a lasher for employer.[1] Employer paid claimant compensation through October 19, 2005.[2] Decision and Order at 2; Jt. Ex. 1. Claimant contended he suffered permanent disabilities to his right shoulder and cervical spine as a result of this injury, and he sought permanent total disability benefits from August 18, 2005, as well as continuing medical benefits. The administrative law judge found that claimant established work-related head and neck injuries and that his condition reached maximum medical improvement on October 19, 2005. Decision and Order at 68-70. Based on claimant's inconsistent testimony, two surveillance tapes, objective findings of the doctors, and doctors' opinions, the administrative law judge discredited claimant's testimony concerning his complaints of pain and inability to use his right arm. Decision and Order at 71-72. Additionally, on the issue of claimant's work restrictions and ability to use his right arm, the administrative law judge gave less weight to claimant's treating physicians because they relied greatly on claimant's subjective complaints. *Id.* The administrative law judge instead relied on the reports and testimony of employer's experts, Drs. Cohn, Mansheim, and Ross, whose opinions he deemed well-reasoned, as they considered claimant's complaints of pain as well as the objective evidence, and they concluded that claimant's ability to function is greater than what he presented and would have others believe. Decision and Order at 72-74; Emp. Exs. 65, 67. Consequently, the administrative law judge found that claimant cannot return to his usual work as a lasher, but can return to work as a general longshoreman, slinger, or hustler driver because none of these jobs requires over-the-shoulder work. As claimant did not present evidence of disability from the neck injury or any alleged psychological problems, the administrative law judge concluded those injuries are not compensable. Decision and Order at 75.

To compensate claimant for his head and neck injury, the administrative law judge awarded temporary total disability benefits from August 17 through October 19, 2005, and permanent total disability benefits from October 20 through November 30, 2005, granting employer a credit for benefits paid. As the administrative law judge found that claimant was not disabled after November 30, 2005, when Dr. Cohn reviewed seven "regular duty job analyses" and approved four of them, Emp. Ex. 41, he denied benefits beginning December 1, 2005. The administrative law judge awarded claimant reasonable

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[1]Claimant testified that another crewman knocked over a lashing rod which landed on claimant's head and right shoulder, hitting his hard hat first. Decision and Order at 4.

[2]Employer paid claimant temporary total disability benefits from July 7, 2004, to February 14, 2005, and from March 1 to October 19, 2005, and it paid temporary partial disability benefits from February 15 through February 28, 2005. The parties stipulated that claimant's average weekly wage is $1,514.55 and his compensation rate is $1,009.70. Jt. Ex. 1.

and necessary pain medication management treatment by Dr. Mingione; however, he denied orthopedic treatment after August 17, 2005, including pain-relief injections given by Dr. Wardell in the summer of 2006, as being unnecessary and unreasonable. Decision and Order at 75-78.

Claimant filed a motion for reconsideration. Claimant argued that he is permanently totally disabled in an economic sense; that permanent partial disability was not an issue at the informal conference, so he was improperly denied leave to submit evidence of his permanent partial disability; and that, nevertheless, under the administrative law judge's findings, he is entitled to permanent partial disability benefits or, at the least, he is entitled to a *de minimis* award. The administrative law judge rejected claimant's arguments, stating that permanent total disability was fully addressed and claimant pointed to no error in the findings, permanent partial disability was not raised by claimant's counsel at the hearing when asked but was properly addressed by the administrative law judge within the nature and extent of disability discussion, and the *de minimis* argument is without merit. M/Recon. at 2.

Claimant appeals the administrative law judge's denial of benefits, arguing that the administrative law judge erred in finding he was not disabled after November 30, 2005, in failing to give the opinions of the treating physicians special consideration, in failing to award permanent partial disability or *de minimis* benefits, and in denying reimbursement of Dr. Wardell's pain-relief injections given in the summer of 2006. Employer responds, urging the Board to affirm the decisions.

A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity, *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Claimant contends he established he cannot return to work via the opinions of his treating physicians and that the administrative law judge erred in failing to give their opinions special consideration. We reject this contention. The opinions of treating physicians are not accorded automatic deference; while the courts have recognized that a treating physician's opinion may be entitled to special weight if it is not contradicted, *see, e.g., Amos v. Director, OWCP*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997), the administrative law judge is entitled to weigh conflicting medical opinions and determine which view is most persuasive. In this case, the administrative law judge found that the treating physicians'

opinions regarding claimant's ability to work were contradicted by the opinions of employer's experts, and the administrative law judge therefore properly evaluated the opinions and determined which should be accorded determinative weight.

Dr. Wardell, claimant's treating orthopedic surgeon since July 7, 2004, performed two surgeries on claimant's right shoulder and diagnosed claimant with a chronic cervical strain and rotator cuff tear of the right shoulder. Cl. Ex. 1 at exh. 10. He determined that claimant's condition reached maximum medical improvement on October 19, 2005, with a 30 percent permanent impairment to the right upper extremity. He released claimant to return to sedentary work; however, he later stated that claimant was totally disabled due to his use of pain medications and weakness in his right shoulder. *Id.* He continued to give claimant subdeltoid injections on a regular basis throughout 2006. Cl. Ex. 1; Emp. Exs. 11-12, 14, 18, 20-21. Dr. Mingione, claimant's psychiatrist and pain management doctor, deferred to Dr. Wardell's opinion regarding physical work restrictions, but diagnosed claimant with mild cognitive impairment, depression and chronic pain. He stated that claimant could not return to work due to these conditions. He treated claimant on a monthly basis with prescriptions for pain medication. Cl. Exs. 2, 9-18; Emp. Exs. 22, 29, 54.

Drs. Cohn, Manheim, and Ross, and the physical therapist, Mr. Schall, whom the administrative law judge credited, disagreed with claimant's doctors and concluded that claimant was trying to hide his actual abilities, as he gave sub-maximal effort during the functional capacity evaluation (FCE), and was capable of a greater range of motion when he was distracted from his "pain." Decision and Order at 71-75; Emp. Exs. 30-31, 35, 41, 44, 56, 57, 60, 65. Dr. Cohn, employer's orthopedic expert who examined claimant several times, stated he had watched the surveillance tapes and saw claimant moving in manners that were inconsistent with his complaints of pain during office visits. While Dr. Cohn stated that claimant should avoid over-the-shoulder use of his right arm based upon the surgeries and the objective findings, he opined that claimant's subjective complaints should be given little consideration regarding work restrictions because claimant's complaints cannot be believed. Dr. Cohn approved claimant's working as a general longshoreman, a slinger, and a hustler driver. Emp. Exs. 28, 41, 57, 60. Dr. Mansheim, employer's psychiatric expert, evaluated claimant and determined that claimant is functionally illiterate, not cognitively impaired. He found there is no psychological disability from either the injury or the medications, and he concluded that the discrepancies between claimant's complaints and the surveillance tape evidence establish that claimant is malingering. Emp. Exs. 33, 44, 58, 65. Dr. Ross, employer's expert on physical medicine and rehabilitation, agreed that claimant's subjective complaints were not credible and that he can perform his usual work. Emp. Ex. 67. Mr. Schall, who performed the FCE in September 2005, stated that claimant's efforts were sub-maximal and there was no physical pathology to account for claimant's complaints.

Emp. Ex. 30. After reviewing the 2005 surveillance video, Mr. Schall opined that claimant was making an effort to hold his right arm down to protect it and that when he was distracted he was able to use his arm without difficulties. Emp. Ex. 31. Additionally, Dr. Pellegrino, a neurologist, concluded that claimant may have pain but that there was no atrophy of the muscles and no neurologic defect. Emp. Ex. 27.

The administrative law judge discredited claimant's complaints of pain, finding they were inconsistent and undermined by activity captured during several hours of surveillance tapes. He also questioned claimant's veracity because of other inconsistencies in his testimony. Decision and Order at 71-72. Accordingly, the administrative law judge gave little weight to the opinions of Drs. Wardell and Mingione because they relied on claimant's discredited subjective complaints in rendering their opinions regarding claimant's work restrictions and abilities. Further, he stated that Dr. Wardell gave no objective support for finding claimant totally disabled on three different occasions and drafting a confusing letter regarding claimant's restrictions.[3] The administrative law judge also stated that Dr. Mingione gave confusing reasons for concluding claimant was depressed and/or suffering from dementia. To the contrary, the administrative law judge found that the opinions of Drs. Cohn, Mansheim, and Ross were well-reasoned, as they considered objective findings as well as subjective complaints, and he noted the supporting opinions of Dr. Pellegrino and Mr. Schall. Decision and Order at 71-73. It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). We affirm the administrative law judge's credibility determinations and his weighing of the evidence, as they are rational and supported by substantial evidence. Therefore, we reject claimant's contention that he is physically incapable of any work.

In addressing claimant's usual employment, the administrative law judge found that claimant worked out of the union hall and had several "usual" jobs. He found that claimant worked as a general longshoreman, a slinger, a hustler driver, and a lasher. Although the administrative law judge found that claimant cannot return to his job as a lasher after his injury, he determined that claimant is capable of performing his other "usual" duties, as those jobs satisfy the requirement to avoid over-the-shoulder work and were approved by Drs. Cohn and Ross. Decision and Order at 75; Emp. Ex. 62. This determination is supported by the reports of the credited doctors. Decision and Order at

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[3]Dr. Wardell wrote a note prohibiting claimant from using his right arm at work while at the same time permitting and encouraging him to use it at home. Emp. Ex. 56.

75; Emp. Exs. 28, 41, 43, 57, 60, 67. However, a claimant's "usual" employment for purposes of determining whether he established a *prima facie* case of total disability is defined by his regular duties at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). At the time of his injury, claimant was working as a lasher, and this job constitutes his "usual" work for purposes of his *prima facie* case. *Manigault*, 22 BRBS 332. The administrative law judge found that claimant can no longer perform over-the-shoulder work and that he therefore cannot perform the duties of a lasher. Consequently, the administrative law judge erred in concluding that claimant can return to his "usual" work, and we vacate this finding.

As claimant cannot return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether a range of jobs is realistically available and suitable for the claimant. *Id.* If the employer establishes the availability of suitable alternate employment, the employee's disability is, at most, partial. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

The jobs as a general longshoreman, a slinger, and a hustler driver, which claimant is capable of performing, constitute evidence of suitable alternate employment. Claimant argues that these jobs were not available to him after November 30, 2005, and that he is therefore entitled to total disability benefits after that date. Specifically, claimant testified that he signed up for work through the union hall between January 19 and March 22, 2006, but did not get hired for any work because "everyone knew" he could not do the work. Tr. at 54-55. The administrative law judge summarized the testimony of claimant and Mr. Parker, a vice president with employer, regarding the availability of this work, Decision and Order at 5, 11; however, he did not discuss this testimony or make a specific finding regarding the availability of this work for claimant. *See Edwards v. Director, OWCP,* 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993) (suitable work must be realistically and regularly available); *see also McBride v. Eastman Kodak Co.,* 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988) (where pre-injury job unavailable, claimant established an inability to return to his usual work). As the administrative law judge did not determine whether suitable jobs were actually available to claimant after his condition reached maximum medical improvement, he must address the issue on remand. If suitable work is not available, then claimant is entitled to permanent total disability benefits.

Alternatively, claimant contends the administrative law judge should have awarded him permanent partial disability benefits for a loss in his wage-earning capacity or *de minimis* benefits. A claim for total disability includes a claim for lesser awards. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). If suitable alternate employment is established, a claimant must establish a loss in his wage-earning capacity in order to obtain permanent partial disability benefits. 33 U.S.C. §908(c)(21), (h); *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). To be entitled to a *de minimis* award, a claimant with a medical disability which presently causes no loss of wage-earning capacity must establish that there is a significant likelihood he will sustain a loss of wage-earning capacity in the future. *Rambo*, 521 U.S. 121, 31 BRBS 54(CRT). The administrative law judge did not address the issues of whether claimant has any actual present or potential future loss of wage-earning capacity resulting from his injury.[4] On remand, if employer establishes that suitable jobs are available to claimant, the administrative law judge must determine whether claimant has sustained a loss of wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001). If claimant sustained no present loss in his wage-earning capacity, the administrative law judge must consider claimant's claim for a *de minimis* award consistent with applicable law. *See Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995); *Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133 (1987); Emp. Exs. 41, 57, 67.

Finally, claimant contends the administrative law judge erred in denying reimbursement for treatment rendered by Dr. Wardell during the summer of 2006. He argues that the administrative law judge misinterpreted Dr. Cohn's opinion regarding future treatment,[5] no doctor criticized Dr. Wardell's treatment, and employer did not properly raise the issue. Employer filed a notice of controversion on May 17, 2006,

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[4]Because the administrative law judge found that claimant could return to his "usual" job as a general longshoreman, slinger, or hustler driver, he did not address the issue of permanent partial disability explicitly. In his decision denying claimant's motion for reconsideration, he stated only that permanent partial disability had been adequately addressed, and he rejected in one sentence claimant's claim for a nominal award. M/Recon. at 2. Thus, he did not make the necessary findings on those issues.

[5]Claimant argues that Dr. Cohn's statement that he did not need orthopedic treatment as of August 17, 2005, did not mean that he would not need it in the future as the administrative law judge found. Decision and Order at 76. Contrary to claimant's argument, the administrative law judge's interpretation is reasonable.

contesting all future medical expenses as unreasonable because claimant had misrepresented his condition to his doctors. Cl. Ex. 15-7(g). At the hearing, the administrative law judge stated that he would address claimant's need for "continued medical treatment and reimbursement." Tr. at 9.

Dr. Cohn's August 17, 2005, report stated that claimant would not move his arm any more than 20 degrees in any direction because of pain, that claimant did not want further surgery, that there was no atrophy of the right arm muscles and a normal neurological examination, and that claimant had shoulder and neck pain following two rotator cuff surgeries. Dr. Cohn recommended discontinuing physical therapy but said aqua therapy might help. Stating that claimant's primary problem is pain management with a psychological overlay, Dr. Cohn recommended specialists to address those issues. At that time, he opined that claimant could not return to longshore work because of the pain and psychological overlay and not because of the physical restrictions from the injury, and he stated that claimant's condition had reached maximum medical improvement and further orthopedic treatment was not needed "at this time." Decision and Order at 26-27; Emp. Ex. 28 at 2. Although the administrative law judge did not credit this opinion in determining the date of maximum medical improvement, he relied on it to find that claimant is not entitled to orthopedic treatment after August 17, 2005. Decision and Order at 76. Nevertheless, the administrative law judge awarded claimant continuing treatment with Dr. Mingione for pain management. Decision and Order at 77. Although the injections given by Dr. Wardell following employer's May 2006 controversion were for pain management, they were given to claimant at the same time he was seeing Dr. Mingione for pain management. Moreover, the administrative law judge found that claimant could not establish the injections' success in reducing his reliance on narcotic pain medication and that Dr. Wardell continued to give claimant the injections despite having not conferred with Dr. Mingione after February 2006. Decision and Order at 77; Cl. Ex. 1 at 53-54. Thus, as he found Dr. Wardell did not even know whether the injections were serving their purpose, the administrative law judge reasonably concluded that the injections were neither necessary nor reasonable. *See, e.g., Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). We affirm the administrative law judge's denial of reimbursement for Dr. Wardell's pain-relief injections subsequent to May 17, 2006.[6]

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[6]We reject claimant's assertion that this issue was not properly raised by employer because it was not the topic of an informal conference. The case had been transferred to the Office of Administrative Law Judges on February 3, 2006, ALJ Ex. 5, prior to employer's notice controverting the medical expenses on May 17, 2006, Cl. Ex. 15-7(g). Moreover, the administrative law judge is permitted to expand the hearing to address

Accordingly, the administrative law judge's denial of disability benefits after November 30, 2005, is vacated, and this case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

issues beyond those identified prior to the transfer of the case, 20 C.F.R. §702.336(a), and as the hearing was held in November 2006, claimant had sufficient notice of the issue.