BRB No. 04-0484

GERALD J. DRUILHET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OMEGA PROTEIN, INCORPORATED)		DATE ISSUED:FEB 4, 2005
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Decision and Order Denying Employer's Motion for Reconsideration, the Supplemental Decision and Order Granting Attorney's Fees, and the Order Denying Motion to Reconsider of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jennifer Jones (Jones Law Firm), Cameron, Louisiana, for claimant.

Alan K. Breaud and Andrew H. Meyers (Breaud & Lemoine), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Decision and Order Denying Employer's Motion for Reconsideration, the Supplemental Decision and Order Granting Attorney's Fees, and the Order Denying Motion to Reconsider (2003-LHC-930) of Administrative Law Judge Clement J. Kennington 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). The amount of an attorney's fee is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a broken right femur and pelvis, as well as injuries to his gallbladder, kidneys and teeth, on September 18, 2000, during the course of his employment with employer as a dock supervisor.[1] Claimant returned to work, at his regular wage rate, in a lighter duty position as a night shift supervisor on July 23, 2001, but was laid off when employer eliminated that position in mid-November 2001. Claimant was thereafter terminated by employer on December 4, 2001, after he declined an offer from employer to work as a warehouse clerk. Employer voluntarily paid claimant temporary total disability benefits from September 19, 2000 through May 7, 2001, and permanent partial disability compensation from May 8, 2001 through September 17, 2002. 33 U.S.C. §908(b), (c)(2).

Claimant thereafter sought total disability benefits commencing as of the date of his layoff and continuing.[2] Tr. at 19. In his Decision and Order, the administrative law judge initially found that claimant reached maximum medical improvement on May 8, 2001. Next, the administrative law judge determined that claimant was unable to perform his pre-injury duties as a dock supervisor with employer and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability compensation from May 8, 2001, and continuing. 33 U.S.C. §908(a).

Employer thereafter sought reconsideration of the administrative law judge's award, and claimant's counsel requested an attorney's fee. In a Decision and Order

[1] Claimant's injuries were sustained when he, for an estimated seven minutes of time, was inadvertently "sucked in" by a ten-inch suction hose that was normally used by employer to remove fish from the holds of vessels.

[2] At the formal hearing, claimant's counsel specifically stated that claimant did not seek disability benefits under the Act for the period of time that he was employed post-injury by employer in the capacity of a night shift supervisor. In his post-hearing memorandum to the administrative law judge, however, claimant alleged that this position was sheltered employment and beyond his physical capabilities. *Compare* Tr. at 18-20 *with* clt's Post-Hearing Memorandum at 5-10. In his response brief to the Board, claimant reiterates his initial position that, as employer paid him his pre-injury wage during his period of post-injury employment, he did not seek benefits for the period of time that he was employed as a night shift supervisor. Clt's Response Brief at 7.

Denying Employer's Motion for Reconsideration issued February 10, 2004, the administrative law judge reiterated his conclusion that employer failed to establish the availability of suitable alternate employment subsequent to his layoff in November 2001. In an Order Granting Attorney's Fees issued on the same day, the administrative law judge noted that employer did not file objections to claimant's counsel's fee petition, and he awarded claimant an attorney's fee of $24,320 and expenses of $4,617.48. Employer's motion for reconsideration of the administrative law judge's fee award was thereafter denied as untimely and, alternatively, as an improper attempt by employer to raise objections for the first time in a motion for reconsideration.

On appeal, employer challenges the administrative law judge's award of total disability benefits to claimant, as well as the administrative law judge's award of an attorney's fee to claimant's counsel. Claimant responds, urging affirmance of the administrative law judge's decisions.

Extent of Disability

Where, as in the instant case, claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986). Employer may meet its burden by offering an injured employee a light-duty job in its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding & Dry Dock Co.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987), so long as the job is necessary and claimant is capable of performing it. *Diosdado v. Newpark Shipbuilding & Repair Inc.*, 31 BRBS 70 (1997). In order for such a job to constitute suitable alternate employment, however, the job must be actually available to claimant. *See Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In addressing the issue of whether employer established the availability of suitable alternate employment, the administrative law judge initially found claimant's testimony that he could not perform the duties of a night shift supervisor to be incredible and not supported by the record. Decision and Order at 15. Rather, the administrative law judge determined that claimant returned to work for employer in the capacity of a night shift supervisor on July 23, 2001, that this position was created in order for employer to retain and utilize claimant's knowledge and experience with the company, that this position did not include any labor activities, that claimant conceded that employer accommodated his

physical restrictions, and that Drs. Duval and Foret approved this position for claimant.[3] *Id.* at 15-16. The administrative law judge therefore found that this position, which claimant performed at his regular wage rate from July 23, 2001, until his economic layoff in November 2001, was within claimant's physical restrictions and did not constitute sheltered employment. *Id.* at 16; Decision and Order Denying Recon. at 2. The administrative law judge subsequently concluded, however, that this position did not constitute suitable alternate employment since it was eliminated by employer in November 2001 and was thus not available to claimant. Decision and Order at 16.

Next, the administrative law judge determined, based upon claimant's physical restrictions and subjective complaints, as well as the testimony of Mr. Hebert, a certified vocational expert, that the warehouse clerk position offered to claimant following his layoff involved activities beyond the physical restrictions placed on claimant and that, therefore, that position was insufficient to establish the availability of suitable alternate employment subsequent to claimant's layoff. Specifically, the administrative law judge found that while claimant was only capable of standing and walking for fifteen minutes at a time, the position of warehouse clerk required frequent walking on concrete floors, that Mr. Hebert opined that this position was more strenuous than claimant's prior work and that claimant is presently unemployable, that claimant lacked the requisite office skills required of the position, and that employer did not seek the approval of this position from claimant's physicians. *See* Decision and Order at 16; Decision and Order on Recon. at 2-4. Based upon the foregoing, the administrative law judge concluded that the identified position of warehouse clerk did not satisfy employer's burden of establishing the availability of suitable alternate employment following claimant's layoff. The administrative law judge therefore awarded claimant permanent total disability benefits as of May 8, 2001, and continuing, with employer being allowed a credit for all wages paid to claimant after that date. *Id.* at 18.

Initially, the administrative law judge's determination that employer did not establish the availability of suitable alternate employment during claimant's period of employment from July 23, 2001, to the date of his economic layoff cannot be affirmed. Specifically, the administrative law judge misapplied the holdings of the United States Court of Appeals for the Fourth Circuit in *Norfolk Shipbuilding & Drydock Corp. v.*

[3] Dr. Duval performed surgery on claimant's injured pelvis and femur. After taking into consideration the results of claimant's Functional Capabilities Evaluation, which limited claimant to light or medium work levels, Dr. Duval opined that claimant was capable of performing the night shift supervisor position with employer. JXs 2 at 22-23; 6. Similarly, Dr. Foret, after opining that claimant was capable of working within the sedentary to moderate range, approved employer's night shift supervisor position. JX 3 at 8-10, 24.

Hord, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), and the Board in *Mendez*, 21 BRBS 22, when he determined that claimant's layoff from a suitable post-injury position retroactively rendered that position in employer's facility unavailable to claimant. In *Hord*, the court addressed the issue of employer's liability for total disability compensation after employer laid off an injured worker from a suitable post-injury position. The court addressed only employer's liability after the lay-off, concluding that, since employer made the suitable job unavailable, it bore a renewed burden of demonstrating the availability of other suitable alternate employment. The court did not hold that the layoff rendered the position retroactively unavailable to the worker for the period during which he successfully worked. Rather, as the position became unavailable as of the time of the layoff, the court ruled that employer could not satisfy its burden thereafter by relying upon a position that was no longer available. *Hord,* 193 F.3d at 801, 33 BRBS at 172-173(CRT). Similarly, in *Mendez*, the Board held that where an employer provided claimant with a job in its facility but then laid claimant off for economic reasons, that job did not meet its burden of establishing suitable alternate employment during the layoff period. Once it withdrew the opportunity for such work, suitable alternate employment in employer's facility was no longer available. *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Pursuant to this precedent, we reverse the administrative law judge's finding that claimant's employment as a night shift supervisor did not establish the availability of suitable alternate employment between July 23, 2001, the date claimant commenced working in this position, and November 2001, the time of his economic layoff, as the administrative law judge's findings that this position was within claimant's physical capabilities and did not constitute sheltered employment are rational and supported by the record.[4] Accordingly, the administrative law judge's award of permanent total disability benefits to claimant during this period of time, as well as his consequent credit to employer for the wages paid to claimant during this period, is vacated. We affirm, however, the administrative law judge's conclusion that claimant's work as a night shift supervisor did not establish the availability of suitable alternate employment as of the date of his economic layoff, as it is uncontroverted that employer made this alternate work unavailable to claimant as of the date of his layoff. As of that date, employer bore a renewed burden of establishing the availability of suitable alternate employment. *See Hord*, 193 F.3d 797, 33 BRBS 170(CRT); *Vasquez v. Continental Maritime of San Francisco*, 23 BRBS 428 (1990); *Mendez*, 21 BRBS 22.

Next, employer challenges the administrative law judge's determination that its offer of a warehouse clerk position to claimant subsequent to claimant's layoff did not

[4] Additionally, we note claimant's statement at the formal hearing and in his response brief to the Board that he was not seeking compensation benefits under the Act for the period of time that he was employed as a night shift supervisor by employer.

establish the availability of suitable alternate employment. Contrary to employer's contentions on appeal, the administrative law judge acted within his discretion in relying upon the testimony of claimant and Mr. Hebert, as well as the physical restrictions placed on claimant, in concluding that the identified position of warehouse clerk was not suitable for claimant, *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), as it is well-established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it. As it is uncontroverted that employer did not proffer any evidence of additional job opportunities that claimant was capable of performing following his layoff by employer, employer has failed to establish the availability of suitable alternate employment. We thus affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment subsequent to claimant's layoff, and his award of total disability benefits to claimant commencing on the date he was laid off by employer.

Attorney's Fee Award

Lastly, employer challenges the fee awarded to claimant's counsel by the administrative law judge. First, employer avers that the administrative law judge erred in awarding claimant's counsel a fee and expenses both while its motion for reconsideration of the administrative law judge's decision was pending and before employer filed its objections to the requested fee. Additionally, employer asserts that it was assured by the administrative law judge's office that counsel's fee request would not be considered until its motion for reconsideration was adjudicated. Employer's contentions of error in this regard are without merit. The administrative law judge's Decision and Order unequivocally stated that employer was to respond to claimant's counsel's fee petition within twenty days of its receipt of that petition, and employer concedes that it did not comply with this time limit. Moreover, since the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees was issued contemporaneously with his Decision and Order Denying Employer's Motion for Reconsideration, the administrative law judge did not enter the fee award until he had considered employer's motion.[5] *See generally Wells v. Int'l Great Lakes Shipping Co.,*

[5] Essentially, employer is arguing that the administrative law judge should have issued his Order on Reconsideration of the award of benefits and then allowed employer additional time to file a response to the fee petition. There is no requirement, however, that he do so, and the administrative law judge clearly stated the limits for filing the fee petition and response in his Decision and Order. Moreover, the administrative law judge addressed employer's contention regarding the alleged telephone conversation with the administrative law judge's office, finding that while he was unconvinced that such a conversation took place, any such discussion would not negate or overrule the requirements for filing a fee petition and objections set forth in his Decision and Order. *See* Order Denying Motion to Reconsider at 3.

693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). The administrative law judge therefore committed no reversible error in issuing his fee order without employer's objections to claimant's counsel's fee request. *See generally Sullivan v. St. Johns Shipping Co., Inc.*, 36 BRBS 127 (2002).

Employer next avers that the administrative law judge erred in determining that its motion for reconsideration of the administrative law judge's fee order was untimely filed. We need not address this specific contention since any error committed by the administrative law judge in determining that employer's motion was untimely is harmless; specifically, the administrative rationally denied employer's request for reconsideration on the alternative grounds that, as employer failed to timely file objections to claimant's counsel's fee request when it was pending before the administrative law judge, it cannot properly raise its opposition for the first time in a motion for reconsideration. *See Ravalli v. Pasha Maritime Services,* 36 BRBS 91 (2002)(Order on Recon.).

Nonetheless, we agree with employer that the administrative law judge's fee award must be vacated. Specifically, there is merit in employer's final contention that the administrative law judge erred in summarily awarding the fee requested and in failing to state why the fee is reasonable under the regulatory criteria, 20 C.F.R. §702.132(a). Regardless of whether employer objected to the fee petition, the administrative law judge must apply the regulatory criteria and award a fee reasonably commensurate with the necessary work. *See Sullivan,* 36 BRBS 127. In the instant case, the administrative law judge, without reference to the Act's implementing regulations, summarily awarded the fee and expenses sought by claimant's counsel. Therefore, on remand, the administrative law judge must reconsider the fee award in conformance with the Act's regulations and any applicable case law.

Accordingly, the administrative law judge's award of total disability compensation to claimant during the period of time that claimant was employed post-injury as a night shift supervisor by employer and his award of a credit to employer for the wages paid to claimant by employer during this period are vacated. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed. Thus, the award is modified to provide that claimant is entitled to permanent total disability benefits from May 9, 2001, to July 23, 2001, and from the date of his lay-off in November 2001 and continuing thereafter. The administrative law judge's fee award is vacated and remanded for reconsideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief

Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge