**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-5422

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EFREN DIOSDADO,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioners,

VERSUS

JOHN BLUDWORTH MARINE, INC.,
and
HARTFORD INSURANCE COMPANY,

Respondents.

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Petition for Review of an Order
of the Benefits Review Board
(BRB #92-0690)

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(September 19, 1994)

Before POLITZ, Chief Judge, SMITH, Circuit Judge, and BERRIGAN,[*] District Judge.

JERRY E. SMITH, Circuit Judge:[**]

Petitioner Efren Diosdado, a longshoreman covered by the

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[*] District Judge of the Eastern District of Louisiana, sitting by designation.

[**] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, appeals the decision of the Benefits Review Board ("BRB") affirming the decision of the administrative law judge ("ALJ") that Diosdado is permanently partially and not permanently totally disabled within the meaning of the LHWCA. For the reasons that follow, we grant the petition for review, vacate, and remand.

I.

A.

Diosdado worked as a welder for John Bludworth Marine, Inc. ("Bludworth"), for several years before he suffered two back injuries that made it impossible for him to continue to work as a welder. Diosdado completed the third grade of formal education in Mexico. He is able to read and write some Spanish and can speak some English but cannot write it. Diosdado came to the United States in 1971 and began to work as a dishwasher, then learned to weld on the job working at shipyards and in the petroleum industry. At Bludworth he did electric welding, but he cannot perform, and is not certified to do, heliarc, tungsten inert gas ("TIG"), or metal inert gas ("MIG") welding.

While working for Bludworth in Pasadena, Texas, in August 1987, Diosdado suffered his first back injury: His slip from a catwalk necessitated a lumbar laminectomy at L4-L5 left in September 1987. His next injury took place in February 1988, on the day he returned to work at Bludworth, when he fell four or five feet from a catwalk and sustained a second back injury. In July

1988, Dr. Arthur Evans and Dr. Bruce Cameron performed a lumbar discectomy with compressive laminectomy including bilateral lateral spinal fusion at L4-5 for herniation of the nucleus pulposus as well as for instability and spondylosis at L4-5.

B.

Cameron continued to monitor Diosdado's condition and in July 1989 noted that he thought Diosdado would reach maximum medical benefit in August 1989. Cameron has testified that he thought at that time that Diosdado suffered a permanent partial disability of about twenty percent. Cameron would have released Diosdado to work provided he did not have to lift more than fifty pounds. Cameron examined Diosdado on August 14, 1989, and determined that he indeed had reached maximum medical improvement.

Cameron continued to examine Diosdado regularly. On November 9, 1989, Cameron reaffirmed his belief that Diosdado had reached maximum medical improvement by the time of the August 14 visit and that the permanent partial disability was about twenty percent.

Cameron monitored Diosdado through August 1990. At his deposition in November 1990, Cameron again stated that Diosdado had reached his maximum medical improvement in August 1989 but that it would be fairer to increase the disability rating to twenty-five percent. Cameron also outlined the restrictions on Diosdado's ability to work. Cameron said that Diosdado could not lift more than fifty pounds nor perform repetitive lifting, bending, or

stooping. As a result, Cameron concluded that Diosdado was not able to return to his old welding job.

C.

Bludworth hired Intracorp as its rehabilitation specialist to work on Diosdado's case. The first contact between Diosdado and Intracorp occurred in July 1989, when Intracorp obtained work and educational histories. Diosdado at that time expressed a desire to return to a welding job. The Intracorp representative, Margaret Couch, met with Cameron in July 1989 and noted that Cameron had placed the following limitations on Diosdado: that he could not lift above fifty pounds and that he could not twist into tight places.

Subsequently, Carmen Jasine, another Intracorp employee, performed a vocational search for welding jobs, identifying TIG and MIG welding as suitable jobs for Diosdado. Between July 31 and August 15, 1990, she visited ten companies and found four who were offering suitable employment: H & H Burglar Bars, Hercules Offshore Drilling, Marais Industries, and Offenhauser. On September 12, 1990, Cameron approved two of the employers: Marais Industries, which was accepting applications through the Texas Employment Commission, and Offenhauser.

From November 5 to November 7, 1990, Bill Shuff of Intracorp located six additional TIG or TIG/MIG welding jobs. The six employers he identified had hired welders prior to the survey but were not hiring when Shuff contacted them.

Mary Anderson testified at the November 14, 1990, hearing that she had determined, subsequent to Jasine's and Shuff's surveys, and given Diosdado's qualifications and the physical limitations set by Cameron, that Diosdado could not perform any of the welding jobs that had been located. As a result of this opinion, Intracorp conducted a phone survey on November 9, 1990, to locate entry-level jobs in the Houston area. Four jobs were identified that Diosdado could perform: an assembly worker at Igloo, work at Fiesta Store No. 2 (a retail grocer), and dishwashing jobs at Pancho's Mexican Buffet and Two Pesos Restaurant.

Diosdado testified at the hearing that he had sought work at four companies prior to the November 14, 1990, hearing. He said that he went to Hercules Offshore Drilling but was told there were no positions available. He went to Fiesta Store No. 5[1] but was not given an application. Diosdado also testified that he went to H & H Burglar Bars, which was not taking applications, and was told when he went to Marais Industries to go to the Texas Employment Commission to apply. Other than these four occasions, Diosdado did not attempt to locate a job in the fifteen months between the time he was declared to be at maximum medical benefit and the time of the hearing.

D.

Diosdado's claim for compensation and medical benefits under

[1] Diosdado apparently had received directions to the wrong Fiesta store.

the LHWCA was tried at a formal hearing before an ALJ on November 14, 1990. The ALJ determined that Diosdado had established a prima facie case of total disability by establishing that his work-related injury prevents him from returning to his usual employment. The ALJ found that the welding jobs that Intracorp proffered were not suitable alternative employment opportunities for Diosdado. The ALJ further indicated that Diosdado could reasonably compete for employment at Igloo but that the evidence was insufficient to establish that the other three non-welding jobs were suitable alternatives. Based upon our holdings in P & M Crane Co. v. Hayes, 930 F.2d 424 (5th Cir.), and New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. Unit A Nov. 1981), the ALJ concluded that Bludworth had met its burden of establishing suitable alternative employment opportunities, thereby rebutting Diosdado's initial showing of total disability.

Thereafter, the ALJ determined that Diosdado had failed to establish that he had exercised reasonable diligence to secure employment within the scope of suitable available work. As a result, the ALJ concluded that Diosdado failed to prove that he is totally disabled within the meaning of the LHWCA.

Diosdado appealed the ALJ's decision to the BRB, which, in a decision and order dated October 22, 1993, affirmed the ALJ's decision in all respects except for a modification to the commencement date for permanent partial disability benefits from August 14, 1989, to November 8, 1990. Diosdado petitions for

review of the BRB's order.

II.

We review BRB decisions for errors of law and adhere to the substantial evidence standard that governs the BRB's review of the ALJ's factual determinations. Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110, 115 (5th. Cir. 1980), cert. denied, 450 U.S. 966 (1981); Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 1005 (5th Cir. 1978). The BRB's decision must be affirmed if it correctly concluded that the ALJ's findings are supported by substantial evidence and are in accordance with the law. O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc., 380 U.S. 359, 362-63 (1965).

The question of whether an employee has suffered a total disability under the LHWCA is answered through a three-step burden-shifting exercise. An employee has the initial burden of demonstrating that he can no longer perform his usual job. An employee who has made this showing has established a prima facie case of total disability. P & M Crane, 930 F.2d at 430. In this case, Cameron's deposition testimony plainly substantiates the ALJ's finding that Mr. Diosdado was unable to continue in his welding position at Bludworth.

By establishing a prima facie case, the employee shifts the burden to the employer to "demonstrate the availability of suitable alternative employment that the injured workers are capable of

performing." Id. In Turner, this circuit developed a two-pronged test by which employers can meet this burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

Turner, 661 F.2d at 1042 (footnote omitted). Once the employer meets the burden of job availability, the claimant still may establish total disability if he can demonstrate that he diligently tried and was unable to secure such employment. P & M Crane, 930 F.2d at 430.

This circuit has specifically rejected the Ninth Circuit's stringent standard, which required employers "to point to specific jobs that the claimant can perform." Turner, 661 F.2d at 1042 (quoting Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327, 1330 (9th Cir. 1980)). Generally, an employer is required to demonstrate only "that at the critical times there were jobs reasonably available within [the claimant's] capabilities and for which [he] was in a position to compete realistically had he diligently tried." P & M Crane, 930 F.2d at 430 (quoting Turner, 661 F.2d at 1043).

Employers are not required to serve as employment agencies for their employees. As we held in Turner, an employer is not required

to present specific information about job vacancies directly to the employee. Instead, an employer is required to present information concerning alternative employment opportunities to the court only and "not to its employee so as to facilitate his job search." Id. at 429 n.9. To hold otherwise would be to eliminate any incentive the claimant has to seek rehabilitation or job retraining. Id. at 431.

Furthermore, in P & M Crane we explicitly rejected the reasoning of Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988), which held that the demonstration of only one alternative employment opportunity by the employer is insufficient to satisfy the employer's burden. 930 F.2d at 431. Turner does not "automatically prevent[] an employer from satisfying its alternate employment burden with the listing of one available job." Id. Thus, in some instances an employer can meet its burden by demonstrating the existence of only one job opportunity.

In P & M Crane, we indicated that in such a situation, "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." Id. We gave one example of such an opportunity: "where the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small." Id. This example is not an exclusive requirement, and in P & M Crane we explicitly rejected "an inflexible rule that would restrict the employer's ability to satisfy this requirement." Id. Whether a job is reasonably

available to a claimant in a particular case is a factual determination. Id.

Here, the ALJ found that Bludworth did not present general employment opportunities available to Diosdado. Intracorp identified four welding possibilities in a survey conducted in July and August 1990. Cameron rejected two of them, H & H Burglar Bars and Hercules Offshore Drilling, because Diosdado would not be able to perform the work. The ALJ also determined that the other two possibilities were not suitable alternative employment opportunities because the evidence did not indicate that Diosdado was qualified for the TIG welding position at Offenhauser and because the evidence was equivocal as to whether Marais Industries would hire applicants who were not fluent in English.

Moreover, the ALJ rejected the six welding positions identified between November 5 and November 7 because the jobs involved TIG or TIG/MIG welding, which the ALJ had determined Diosdado was not qualified to perform. Finally, the ALJ rejected three of the four entry-level positions identified from the phone survey conducted on November 9, 1990. The job at Fiesta Store No. 2 was found to be unsuitable because the record did not contain evidence to establish the physical requirements of the work. The dishwashing jobs were rejected because of a lack of evidence on whether Diosdado could physically perform them. The BRB was correct in affirming the ALJ's findings that these jobs were not suitable alternative employment opportunities, as substantial evidence exists to support the findings.

The ALJ further determined that the Igloo job, one of the entry-level positions located by Intracorp on November 9, 1990, satisfied the employer's burden in accordance with P & M Crane. We agree that the fact that the job opportunity was given to claimant five days prior to the formal hearing on November 14, 1990, is of no consequence, for, as we have stated, an employer need not present job vacancies directly to the employee. P & M Crane, 930 F.2d at 429 n.9. We also agree that the fact that Intracorp did not clear the Igloo possibility with Cameron was of no consequence, as the requirements of the job were within the limitations Cameron had imposed for suitable work.

We conclude, however, that the BRB erred in affirming the ALJ's finding that there was a reasonable likelihood that Diosdado could obtain the job at Igloo. Again, we emphasize that this determination is case-specific and that P & M Crane described only a general standard. The hypothetical given in P & M Crane is only an example, and we reject the contention of the Director, Office of Workers' Compensation Programs, that an employer can satisfy its burden with a showing of a single job only if exceptional circumstances similar to the P & M Crane hypothetical are present.

That hypothetical establishes, however, that more must be shown than the mere existence of a job the claimant can perform. The single opportunity in this case is completely different in degree from the example offered in P & M Crane. The entry-level job here does not require a skilled employee who must perform specialized work, and the number of workers in the local community

qualified to perform such work is likely very high.

In the absence of a reasonable likelihood that Diosdado could obtain the single Igloo job, it becomes significant that the employer here did not proffer any testimony of general availability of jobs Diosdado could perform. This distinguishes the instant facts from those in P & M Crane, in which we reasoned as follows: "Here, we do not have a factual situation similar to that in Lentz. Both employers appear to have described a number of other general employment opportunities that were available in the local communities))opportunities that the ALJ and BRB may have failed to consider." Id. at 431 (footnote omitted). Accordingly, the present facts do not reflect a reasonable likelihood of Diosdado's obtaining employment. Accordingly, the decision of the ALJ is not supported by substantial evidence.

Because the employer in this case failed to disclose to the court any general employment opportunities that were suitable alternatives for the claimant, we have been confronted with the rare situation in which only one specific job is offered as suitable employment. Such an offering will satisfy the employer's burden in certain circumstances, but the facts of this case do not present us with such a situation. Thus, we need not address whether Diosdado made a diligent effort to obtain available employment.

Accordingly, the petition for review is GRANTED, and this decision of the BRB is vacated and remanded to the BRB for further appropriate proceedings.