BRB No. 98-1074

MICHAEL K. HUGHES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VANGUARD MACHINE	)	DATE ISSUED: April 7, 1999
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSUA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Stuart Y. Luckie (Diamond, Hasser & Frost), Mobile. Alabama, for claimant.

Mary Beth Mantiply (Mantiply & Associates), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1262) of Administrative Law Judge C. Richard Avery 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 if they 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).

On January 31, 1995, claimant sustained an injury to his back during the course of his employment as a marine mechanic. Employer voluntarily paid temporary total disability benefits to claimant from January 31, 1995 to March 15, 1995, at which time claimant commenced light-duty work within his physical restrictions for this employer. *See* 33 U.S.C. §908(b). Claimant continued working in this position until he was released on December 7, 1995, when employer ceased operations. Claimant subsequently sought disability benefits under the Act for the period following his release from employer.

In his Decision and Order, the administrative law judge, after initially finding that claimant's light-duty work for employer subsequent to March 15, 1995, established the availability of suitable alternate employment, denied claimant's request for ongoing disability benefits.

On appeal, claimant contends that the administrative law judge erred in denying him ongoing benefits under the Act. Employer responds, urging affirmance.

It is undisputed that, following his work injury, claimant was unable to return to his usual pre-injury job activities and that, upon his return to work on March 15, 1995, claimant was given work duties within his physical restrictions. Once claimant demonstrates an inability to return to his usual work, employer may prove that claimant is at most partially disabled by establishing the availability of other jobs claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet its burden by offering an injured employee a light duty job in its facility so long as the position is tailored to meet claimant's physical restrictions, and the job is necessary and profitable to employer's business. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Diosdado v. Newpark Shipbuilding & Repair Inc.*, 31 BRBS 70 (1997); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). The fact that claimant works after an injury, however, will not forestall a finding of total disability if claimant works only through extraordinary effort or is provided a position only through employer's beneficence. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

Claimant initially contends on appeal that the administrative law judge erred in finding that his post-injury work for employer was not sheltered employment. We disagree. In the instant case, the administrative law judge concluded, based upon the testimony of Mr. Smith and claimant, that claimant's post-injury work did not constitute sheltered employment. Mr. Smith, employer's co-owner, testified that claimant, upon his return to work, performed work as both a machinist and a fire watch, as well as answering phones. *See* Tr. at 149-155. In addressing this issue, claimant testified that, while working within his

restrictions, he located needed material and prices for employer, helped other workers, and was sent to Cuba to serve as a liaison between employer and the U.S. Navy. *See id.* at 24, 26, 51. Inasmuch as these credited opinions constitute substantial evidence in support of the administrative law judge's finding, we affirm the administrative law judge's determination that claimant's post-injury work for employer did not constitute sheltered employment, and his consequent finding that this work established the availability of suitable alternate employment. *See Peele,* 20 BRBS at 133.

In the alternative, claimant contends that the administrative law judge erred in denying him benefits subsequent to December 7, 1995, the date upon which claimant asserts that suitable alternate employment became unavailable to him. In denying claimant's request for ongoing benefits subsequent to his release, the administrative law judge found that "claimant is an intelligent and capable man who must take a chance on unemployment like everyone else." *See* Decision and Order at 18.

We agree with claimant that the administrative law judge's denial of all benefits subsequent to December 7, 1995, cannot be affirmed. While an employer may rely upon a job within its own facility to meet its burden of establishing the availability of suitable alternate employment, that job must be actually available to claimant. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Where, as here, claimant establishes a *prima facie* case of total disability and employer withdraws the opportunity for light duty work, through no misfeasance on claimant's part, with the result that suitable alternate employment in the employer's facility is no longer available, employer cannot avoid liability for total disability absent the showing of other suitable alternate employment. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Thus, by relying solely on a light-duty job in its own facility that was eliminated on December 7, 1995, employer has failed to prove that suitable alternate employment was actually available to claimant subsequent to that date. Therefore, the administrative law judge's conclusion that claimant is not entitled to benefits subsequent to December 7, 1995, cannot stand. However, the record reflects and claimant concedes that, on his own initiative, he was able to locate employment for a limited period of time subsequent to December 1995; this position may establish that claimant was only partially disabled during this time. *See Wilson,* 22 BRBS at 465-466. We, therefore, vacate the administrative law judge's determination that claimant is not entitled to benefits subsequent to December 7, 1995, and remand the case for the administrative law judge to consider the extent of claimant's disability after this date.

Accordingly, the administrative law judge's decision denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge