BRB No. 04-0736

NANCY E. ROSS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 06/17/2005
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-LHC-01329, 2002-LHC-01330, 2002-LHC-01331, 2002-LHC-02563) of Administrative Law Judge Daniel F. Sutton 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 began working for employer as a welder in 1974. However, she developed shortness of breath and a persistent cough. She sought treatment from her doctor, who advised that she stop working as a welder; claimant left this job after about three months. In 1980, claimant returned to employer as a laborer in the paint shop.

Eventually, she redeveloped breathing problems. She was placed in limited duty status with a restriction against grinding painted surfaces, but, because of continuing respiratory problems, was given permanent restrictions of no exposure to paint fumes and no work in closed areas without good ventilation. She remained in the paint department but performed cleaning duties around the "ways" (wedge-shaped concrete structures where ships are constructed). She remained on this assignment for ten years. Claimant was assigned additional cleaning duties in January 1997, but began to notice shortness of breath and respiratory problems similar to her earlier symptoms. After being examined by a pulmonary specialist who diagnosed occupationally-induced asthma, claimant was limited to outside maintenance work. Her duties included snow and ice removal in the winter months, and mowing lawns, trimming, mulching, and general clean-up during warmer weather. Claimant was injured on May 10, 1999, while mowing the lawn area between the main office and the aluminum shop. She testified that she was mowing wet grass on a slope, in an awkward position. She stated that she felt something "like a snap" in her back and that her neck started hurting. Tr. at 57-58. Claimant was placed on light-duty work and referred to physical therapy, but she continued to report problems and was taken out of work on June 3, 1999, by employer's nurse-practitioner pending the results of a neurological consultation. Claimant has not returned to work with employer since that time. Claimant testified that she looked for full-time alternate employment without success. However, she did find seasonal part-time work as a summer gatekeeper for a campground in Bath, Maine.

Claimant initially pursued a claim under the Maine Workers' Compensation Act. The Maine Workers' Compensation Board affirmed the hearing officer's conclusion that claimant did not establish that she was totally disabled and declined to alter the hearing officer's award of partial incapacity compensation. Emp. Exs. 17, 21. Claimant also sought benefits under the Longshore Act.

In his decision, the administrative law judge found that although claimant's actual activity at the time of the May 10, 1999 injury, mowing the lawn, does not fall under the Act's coverage, some of claimant's other duties, which included clearing snow and ice from the crane rails and clearing dock areas in preparation for the loading of ordnance onto ships, were essential to the shipbuilding process. Thus, the administrative law judge concluded that as it does not matter that claimant was not performing a maritime function at the time of her injury, and claimant's essential duties were not episodic or isolated, claimant's injury is covered by the Act.[1] With regard to the extent of claimant's

[1] The case before the administrative law judge also involved claimant's respiratory injuries. The administrative law judge found Birmingham Fire to be the responsible carrier for the respiratory injuries, but he did not award any benefits for this injury. Claimant does not appeal this finding. The only benefits claimant sought were for the

disability, the administrative law judge rejected employer's contention that collateral estoppel should be accorded to the Maine determination that claimant is only partially disabled. After reviewing the evidence of the extent of claimant's disability, the administrative law judge found it to be undisputed that claimant cannot return to the maintenance duties she was performing at the time of her injury on May 10, 1999. In addition, the administrative law judge found that employer established evidence of suitable alternate employment. However, the administrative law judge found that claimant convincingly rebutted the showing of suitable alternate employment by showing that she diligently, yet unsuccessfully, sought alternate employment. Thus, the administrative law judge found that claimant is entitled to ongoing total disability benefits since May 10, 1999, except for the periods when she was able to work and earn wages. As these earnings were less than her pre-injury average weekly wage, he awarded claimant partial disability for these periods.

On appeal, employer contends that the administrative law judge erred in finding that the May 10, 1999, injury is covered under the Act, as claimant's snow removal work was irregular and episodic. In addition, employer contends that the administrative law judge erred in finding that collateral estoppel is not applicable to the issue of the extent of claimant's disability, and that claimant's seasonal work shows that she has an ongoing earning capacity, contrary to the administrative law judge's finding. Claimant responds, urging affirmance of the administrative law judge's decision.

STATUS

Employer contends that the administrative law judge erred in finding that claimant's duties as a outside groundskeeper are covered under the Act. Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker…." 33 U.S.C. §902(3). Generally, a claimant satisfies the "status" requirement if she is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy the status requirement, a claimant need only "spend at least some of [her] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1019 (1998). Thus, the administrative law judge correctly stated that claimant need not be employed in maritime activity at the time of injury, *Maher Terminals, Inc. v.*

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period after the May 10, 1999, injury and the administrative law judge found that this disability is not due to any respiratory problems.

Director, OWCP, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *cert. denied*, 124 S.Ct. 957 (2003), as long as regular portion of the overall tasks to which claimant could have been assigned are covered activities. *Id.; Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23(CRT) (1st Cir. 1984); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

The Board has addressed the coverage of employees engaged in cleaning and maintenance activities. In *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002), the Board held that the claimant, who spent four hours every day emptying, from ships' sides, 55 gallon drums filled with shipbuilding debris was covered under the Act pursuant to *Schwalb*, as the only rational inference based on the evidence presented is that claimant's failure to remove the debris eventually would lead to such a build-up of trash that work on the ships could not continue. *Watkins*, 36 BRBS at 23-24. Consistent with the Supreme Court's statement in *Schwalb* that "it is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed," *Watkins*, 36 BRBS at 24, quoting *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT), the Board concluded "that the trash's impediment to shipbuilding may not be immediate does not compel the conclusion that claimant's work removing shipbuilding debris is not integral to the shipbuilding process." *Watkins*, 36 BRBS at 24. The Board accordingly held that the claimant's work emptying trash barrels from the ship's sides met the status test as it was integral to the employer's shipbuilding and repair operations. *Id.; see also Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002). In *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002), the Board affirmed the administrative law judge's finding that an employee who changed the air conditioning filters in the fabrication shop was a covered employee. The administrative law judge rationally credited evidence that such changes occurred frequently and concluded that this fact demonstrates that the claimant's position is integral to the shipbuilding process. *Cf. Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1998)(affirming finding that janitor who cleaned and stocked restrooms was not integral to shipbuilding).

In the instant case, the administrative law judge discussed these cases and found that while the duties claimant was performing at the time of her injury were not covered under the Act, she performed other duties which are indisputably essential to the shipbuilding process, such as clearing snow and ice from the crane rails and clearing dock areas in preparation for the loading of ordnance onto ships. The administrative law judge found that failure to do this would impede shipbuilding. Decision and Order at 12. Claimant testified that after her last job reassignment, her wintertime activities included shoveling snow and chipping ice around the production ships, the ship ramps, and the production walkways.[2] She also testified that she maintained the crane rails by removing

[2] Claimant did testify that she did not work on the ramps or the piers in 1999, however, claimant had a slip and fall in January 1998 on the south pier where she was

ice and debris. Tr. at 46-47, 56. In addition, claimant testified that her duties included cleaning the piers for "ammo load-outs," which occurred during production hours. *Id*. at 167, 209; Cl. Ex. 39. Claimant's supervisor, Mr. Morris, testified that cleaning the rails was sometimes the responsibility of the employees in claimant's classification. He also stated that an employee on the volunteer or emergency lists for snow removal could have been called in on the weekend to remove snow from the crane area. Tr. at 136-137. Mr. Morris described claimant's duties regarding "ammo load-outs" in an affidavit as occurring before the loadings and production work and stated that they were not ordinary occurrences and would have occurred on only two occasions. Emp. Ex. 56.

We reject employer's contention that Mr. Morris's testimony supports the finding that claimant's duties cleaning snow and ice were episodic and irregular and thus insufficient to support a finding of coverage under the Act. The administrative law judge rejected this contention and found that claimant's duties were "more than momentary, episodic or incidental."[3] Decision and Order at 12-13. Work cannot be considered "episodic" when it is a part of the employee's regular job assignments. *See Lewis*, 31 BRB at 40; *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). The United States Court of Appeals for the First Circuit, in whose jurisdiction the present case arises, rejected the argument that an employee's maritime work was episodic where he assisted in the loading process when needed by employer, stating that these duties were not discretionary or extraordinary occurrences but rather a regular portion of the overall tasks to which the claimant could have been assigned. *Levins*, 724 F.2d at 9, 16 BRBS at 32-33(CRT). The administrative law judge credited claimant's testimony, which establishes that her duties clearing ice and snow from the crane rails were a normal part of her job, and he rationally concluded that this activity is essential to shipbuilding. *Watkins*, 36 BRBS at 24. Employer has demonstrated no reversible error in this finding.[4] Therefore,

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sent to remove snow. She also testified that she was sent to both production and non-production areas for groundskeeping, wherever she was needed, up until her last day of work. Tr. at 105.

[3] The administrative law judge did not directly address Mr. Morris's testimony that employees in claimant's job description were placed on emergency lists to be called for snow removal when it snowed on weekends, although he found Mr. Morris's testimony to be generally consistent with claimant's. However, claimant testified that snow and ice removal was a regular part of her duties and Mr. Morris's testimony does not contradict this testimony.

[4] We reject employer's contention that the decision in *Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977), is controlling in the instant case. Unlike the claimant in *Banks*, the claimant in the instant case had duties which included clearing

we affirm the administrative law judge's finding that the Section 2(3) status requirement is met in this case as it is rational, supported by substantial evidence, and in accordance with law. *See generally Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

COLLATERAL ESTOPPEL

Employer contends that the administrative law judge erred in finding that collateral estoppel does not apply to preclude relitigation of the issue of the extent of claimant's disability. Under the principle of collateral estoppel, a party is barred from relitigating an issue decided in prior litigation if: (1) the issues at stake are identical in both cases; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Lawlor v. National Screen Service Corp*., 349 U.S. 322 (1955); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). In order for collateral estoppel effect to apply to a prior finding, the same legal standards must be applicable in both forums. *See, e.g., Casey v. Georgetown University Medical Center*, 31 BRBS 147, 151 (1997). Collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 21, 31 BRBS 109, 111(CRT) (1st Cir. 1997).

In the present case, employer initially paid voluntary benefits under the Maine Workers' Compensation Act. In December 1999, employer notified claimant that it intended to terminate the voluntary payments, and claimant filed a petition for review with the state Workers' Compensation Board. A hearing was held, and the hearing officer found that claimant is capable of working full-time and earning minimum wage. Therefore, she concluded that claimant is entitled only to partial disability benefits under the state act. Emp. Ex. 17. The Board declined to alter the hearing officer's conclusion on reconsideration. Emp. Ex. 21. Subsequently, claimant pursued total disability benefits under the Longshore Act. In his decision, the administrative law judge found that collateral estoppel does not preclude litigation of the issue of the extent of claimant's disability because the burdens of proof differs under the two acts. Specifically, claimant's burden under the Longshore Act is lighter than that under the state act because she only has to show her inability to do her usual work, not her inability to do any work. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). In addition, under the state act employer need not establish suitable alternate

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snow and ice from production areas. Moreover, the "support services" rationale used in *Banks* has been rejected. *See, e.g., Sumler*, 36 BRBS at 101 n.7.

employment as under the Longshore Act, but only claimant's capacity for work. *See Plourde*, 34 BRBS at 48.

The administrative law judge relied on the Board's decision in *Plourde*, 34 BRBS 45. In *Plourde*, the Board considered a case in which the claimant was found to have a residual earning capacity by the Maine Workers' Compensation Board. Subsequently, the claimant sought permanent total disability benefits under the Longshore Act. The Board reversed the administrative law judge's application of collateral estoppel to the issue of the extent of claimant's disability, holding that employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act and that claimant bore a higher burden of establishing his inability to work at all under the state act. *Plourde*, 34 BRBS at 48. The Board rejected employer's contention that the First Circuit's opinion in *Acord*, 125 F.3d 18, 31 BRBS 109(CRT), required a contrary decision, holding that the decision in *Acord* states that if the burdens of proof are different in the two forums, collateral estoppel may not apply. *Plourde*, 34 BRBS at 49.

Employer contends that *Plourde* is not applicable under the facts of the instant case as claimant was the petitioner before the state Board and therefore carried a different burden of proof. However, employer's burden before the state Board was even lighter in this case than it was in *Plourde*, as claimant was the moving party. Claimant, as the moving party in the state claim, had the burden of establishing that she was disabled from any work, whereas under the Longshore Act claimant's initial burden was met,[5] thus shifting to employer the burden establishing the availability of suitable alternate employment in order to avoid liability for total disability benefits. *Compare Morse v. Fleet Financial Group*, 782 A.2d 769 (Me. 2001) with *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). Specifically, under the Longshore Act, employer must provide evidence of realistically available jobs, either at its facility or on the open market, that claimant can perform, given her age, education, vocational background and physical restrictions. *Legrow*, 935 F.2d at 434-435, 24 BRBS at 207(CRT). Only after employer has established suitable alternate employment under the Act does claimant bear the burden of establishing reasonable diligence in attempting to secure alternate employment. *See id.; Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). In contrast, under the state act, claimant was initially required to show that all work is unavailable to her within her restrictions in order to retain total disability benefits, a burden she did not carry. *See Morse*, 782 A.2d 769.

[5] The parties do not dispute that claimant cannot return to her former employment.

As in *Plourde*, the parties' burdens of proof regarding the extent of claimant's disability were not the same under the two acts. Moreover, the state board did not make a finding as to whether claimant diligently and unsuccessfully sought work, as it found that claimant's evidence on this issue was not exchanged in a timely manner. *See* Emp. Ex. 17; *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995)(collateral estoppel is inapplicable to issue that was not actually litigated and decided). Therefore, as it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that collateral estoppel is not applicable to preclude the relitigation of the extent of claimant's disability in this case. *Plourde*, 34 BRBS 45.

EXTENT OF DISABILITY

Employer contends that the administrative law judge erred in finding that claimant is entitled to total disability benefits. The administrative law judge found that employer established the availability of suitable alternate employment, but that claimant diligently, yet unsuccessfully, sought alternate employment. The claimant can rebut the employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if she shows she diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal*, 784 F.2d 867, 18 BRBS 79(CRT). The Second Circuit, in *Palombo*, observed that "claimant, in proving due diligence, is not required to show that he tried to get the identical jobs the employer showed were available," but instead "merely must establish that he was reasonably diligent in attempting to secure a job, 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.' [*New Orleans (Gulfwide) Stevedores v.] Turner*, 661 F.2d [1031,] at 1043, [14 BRBS 156 (5th Cir. 1981)]." *Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT).

In the present case, the administrative law judge found that claimant credibly testified that she had applied for hundreds of jobs in the categories identified by employer's vocational expert but that she was unable to secure employment. Employer contends that the administrative law judge favored claimant's quantity of contacts over quality of the search. However, while claimant arguably applied for positions for which she was not qualified, employer does not dispute that claimant also applied for positions similar to the ones identified by the vocational expert. Moreover, the administrative law judge considered the vocational expert's testimony that claimant's work search would have been more effective if she had been less direct in disclosing the reason she left employer, but he found that claimant's honest and accurate responses on an employment application do not show a lack of diligence in seeking alternate employment. We affirm this rational finding as there is no evidence that claimant presented the information regarding her disability to prospective employers except as a direct answer to the

question regarding her former employment. Consequently, we reject employer's contention that the evidence does not establish that claimant diligently sought alternate employment. *See Fortier v. General Dynamics Corp.*, 38 BRBS 75 (2004).

Finally, employer contends that claimant's temporary summer employment as a campground gatekeeper establishes that she has at least a seasonal wage-earning capacity. Employer contends that claimant's wage-earning capacity for the summer period should be adjusted to reflect a minimal earning capacity for the whole year and awarded as permanent partial disability benefits. The administrative law judge made the implicit finding that claimant's temporary summer job in 2001 and 2002 as a campground gatekeeper does not establish that claimant has a permanent residual earning capacity. Rather, the administrative law judge adjusted claimant's award of permanent total disability benefits to reflect the two periods of permanent partial disability. While employer's assertion that a part-time job may be considered suitable alternate employment for the purposes of determining a claimant's post-injury wage-earning capacity is correct, *Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985), claimant does not retain the position as a gatekeeper from year to year, but must instead apply for the job each summer. Tr. at 177-178. At the time of the hearing, claimant had applied for the 2003 summer season, but did not know if she had been hired. *Id.* at 178-179. The Board has held that when a claimant, who is seeking an award of total disability benefits, is able to work in short-term employment, the administrative law judge may award total disability benefits from the time claimant did not work, punctuated by partial awards for the time claimant was engaged in part-time employment. 33 U.S.C. §908(b), (e); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981) (Miller, J., dissenting and concurring). As claimant does not retain any rights to the position as a gatekeeper, and employer has not established that a similar position is available on the open market, we affirm the administrative law judge's finding that claimant is entitled to total disability benefits, with an adjustment to partial disability for the summer period if she works.[6] *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994)(ability to earn wages must be sufficiently regular to establish true wage-earning capacity).

[6] Claimant does not contest the administrative law judge's finding that she is not entitled to total disability benefits for the periods she worked at the campground. *See generally Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

Accordingly, the Decision and Order of the administrative law judge Awarding Benefits is affirmed.

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