BRB No. 00-0943

JUSTIN J. CLOUD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INDUSTRIAL MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of John M. Vittone, Administrative Law Judge, United States Department of Labor.

Justin J. Cloud, Portland, Oregon, *pro se*.

Jill M. Riechers (Liberty Northwest Insurance Corporation), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (1999-LHC-190) of Administrative Law Judge John M. Vittone 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine whether 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); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

Claimant injured his back on May 10, 1997, while working for employer as a laborer. Following this work injury, claimant was transported to a local hospital where he was diagnosed as having sustained a thoracic strain and told to remain off-duty for 48 hours. *See* Emp. Exs. 9, 10. On May 12, 1997, claimant was released for light-duty work with no lifting in excess of 10 pounds and limited overhead reaching, pushing, and pulling. *See* Emp. Ex. 11. On that same day, claimant returned to work for employer and was placed in a light duty position; specifically, claimant was assigned to work the night shift in employer's tool room. *See* Emp. Ex. 45 at 8-9, 11-12. Claimant was laid off by employer on May 25, 1997. *See* Emp. Ex. 44 at 60. Within a week, claimant was able to secure other employment, and he has held a number of jobs since that time. *See* Emp. Exs. 33-40.

In his Decision and Order, the administrative law judge found, based upon the uncontradicted medical opinions of Drs. Vessely and Wong, that claimant is not suffering from a permanent disabling work-related injury. Additionally, as claimant worked for employer as well as numerous other employers following his work injury, the administrative law judge concluded that claimant did not suffer from a temporarily disabling injury, as claimant failed to establish a loss in wage-earning capacity. Accordingly, the administrative law judge denied claimant's claim for disability benefits. The administrative law judge did, however, award claimant all reasonable, appropriate, and necessary medical expenses arising as a result of the May 10, 1997, work incident.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for disability benefits, noting that he was initially released to return to work with a ten pound lifting restriction. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant is entitled to disability benefits for any period his work injury causes a total or partial loss of wage-earning capacity. *See generally Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Where, as in the instant case, it is uncontroverted that claimant was incapable of resuming his usual employment duties with his employer following his work injury, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of specific jobs that claimant can perform, which, given the claimant's age, education, and background, he could likely secure if a diligently tried. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Employer may meet this burden by offering claimant a job in its facility which is tailored to the employee's physical limitations, *see Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News*

Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986), 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; thus, where an employer provides claimant with a light duty job at its facility but then lays claimant off for economic reasons, it cannot rely on that job to meet its burden of establishing suitable alternate employment because it has made the alternate work unavailable. *See Norfolk Shipbuilding & Drydock Corp. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999); *see also Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *Wilson v. Dravo Corp.,* 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In his decision, the administrative law judge initially relied upon the opinions of Drs. Wong and Vessely in determining that claimant is not suffering from a permanently disabling condition. Dr. Wong first examined claimant on July 22, 1997, at which time he diagnosed a thoracic strain and released claimant for medium duty work. *See* Emp. Ex. 16. On April 7, 1998, Dr. Wong determined that claimant's strain was medically stationary and, on March 12, 1999, he released claimant to return to work with no restrictions. *See* Emp. Exs. 19, 20. Dr. Vessely opined that, as of the date of his examination on May 10, 1999, claimant did not manifest a thoracic strain objectively and should be able to work in heavy-type employment without any restrictions. *See* Emp. Ex. 22 at 4-5. Additionally, Dr. Vessely opined that any strain experienced by claimant should have resolved within six to eight weeks. *Id.* at 5. Contrary to the administrative law judge's decision, the opinions of Drs. Wong and Vessely do not in fact support the conclusion that claimant had no disability after his May 10, 1997, work injury. While the opinions support the conclusion that claimant has no ongoing permanent impairment and thus that at some point claimant was no longer disabled by his thoracic strain, they cannot establish that claimant did not suffer any disability for a period following his May 10, 1997, work-injury. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990).

Based on these medical opinions, and the evidence regarding claimant's post-injury employment, the administrative law judge's finding that claimant sustained no temporary disability as a result of the May 10, 1997, work injury cannot be affirmed. The events following claimant's May 10, 1997, injury were not in dispute before the administrative law judge. Following his work injury, claimant was diagnosed with a thoracic strain and was instructed by a physician not to return to work for two days. Claimant thereafter returned to work with restrictions. Mr. Willmott, employer's CEO of Marine Operations, unequivocally testified that upon his return to work claimant was placed on light duty work; specifically, claimant was assigned to work the night shift in employer's tool shed where he distributed light tools such as screwdrivers, wrenches and pliers. *See* Emp. Ex. 45 at 8-9, 11-12. Claimant was subsequently released by employer, and he soon commenced employment with

numerous employers. Given these unchallenged events, claimant established a *prima facie* case of disability following his work injury as he was released to work with restrictions and placed on light duty; moreover, as employer withdrew the opportunity for light duty work, through no misfeasance on claimant's part, suitable alternate employment in the employer's facility is no longer available. *See Hord,* 193 F.3d 797, 33 BRBS 170(CRT); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Mendez,* 21 BRBS 22.

However, it is also undisputed that claimant, on his own initiative, was able to locate and perform employment with numerous employers subsequent to his layoff by employer.[1] Contrary to the administrative law judge's decision, this fact does not end the inquiry. From a medical standpoint, there is no evidence that claimant was able to work without restrictions at the time of the layoff. Economically, moreover, the fact that claimant was employed thereafter does not establish that he had no loss in wage-earning capacity. *See, e.g., Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54 (CRT)(1997); *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213(CRT)(9th Cir. 1991). Under Section 8(e), of the Act, 33 U.S.C. §908(e), claimant may be entitled to an award for temporary partial disability following his work injury based on the difference between his pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid claimant under normal employment conditions as injured. *See Long v. Director, OWCP,* 767 F.2d 1578, 17 BRBS 149(CRT)(9th Cir. 1985).

[1]Regarding the issue of claimant's post-injury employment, employer submitted into evidence numerous earnings statements from claimant's post-injury employers. *See* Emp. Exs. 33-40.

In the case at bar, however, the administrative law judge did not address the relevant facts under Section 8(e) and (h) of the Act; rather, the administrative law judge summarily stated that, as claimant worked for numerous employers post-injury, claimant did not suffer from a temporarily disabling injury following his work accident since he failed to establish a loss in wage-earning capacity under the Act. *See* Decision and Order at 9-10. As evidenced by this summary statement, the administrative law judge did not properly analyze whether claimant sustained a loss in wage-earning capacity in his post-injury employment, which requires an initial determination of claimant's actual post-injury wages and whether they fairly and reasonably represent his post-injury wage-earning capacity.[2] *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT)(D.C. Cir. 1984). Additionally, even if claimant's post-injury wages fairly and reasonably represent his wage-earning capacity, those wages must be adjusted back to the wage level paid at the time of claimant's injury and compared to claimant's pre-injury average weekly wage in order to determine whether claimant has sustained a loss in wage-earning capacity. *See, e.g., Richardson v. General Dynamics Corp.,* 23 BRBS 327 (1990). Based upon the foregoing, the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity following his May 10, 1997, work injury, and his consequent denial of all disability benefits, cannot be affirmed. Accordingly, we vacate the administrative law judge's finding that claimant did not sustain a loss of wage-earning capacity post-injury, and his consequent denial of disability benefits, and we remand the case for the administrative law judge to determine the duration of any disability sustained by claimant post-injury by applying the applicable law to the relevant evidence of record.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[2]The party seeking to prove that actual wages do not fairly and reasonably represent wage-earning capacity bears the burden of proof. *See, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT)(5th Cir. 1992).

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge