BRB No. 05-0422

MATTIE N. CAMPBELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADM/GROWMARK RIVER SYSTEM, INCORPORATED	)	DATE ISSUED: 11/30/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order, the Order to Amend Decision and Order, and the Second Order to Amend Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Joseph J. Lowenthal, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Order to Amend Decision and Order, and the Second Order to Amend Decision and Order (2003-LHC-1529) of Administrative Law Judge Patrick M. Rosenow 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 which 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).

Claimant sustained work-related injuries to her shoulder and neck on August 15, 1995, while working for employer as a laborer. Following treatment, claimant returned to work in November 1995, but was eventually unable to perform her usual employment duties as a laborer. On October 28, 1996, she accepted employer's offer of employment

as an evening-shift security guard. In November 1996, employer's day-shift security guard went on vacation, and employer reassigned claimant to his position. Claimant never returned to the evening shift, as the day-shift security guard decided to retire and employer reassigned claimant permanently to the day-shift position. Claimant underwent shoulder decompression surgery on March 13, 2002; upon her return to work in October 2002, employer informed her that as a result of newly enacted Congressional legislation it had been required to hire contract workers to work as security guards and that a number of her employment duties had been assigned to other employees. On April 30, 2004, employer terminated claimant's guard position, and she has not been gainfully employed since that time.

In his Decision and Order, the administrative law judge determined that claimant established a *prima facie* case of total disability, and that while her employment as an evening-shift security guard constituted sheltered employment, claimant's subsequent work as a day-shift security guard was not sheltered employment in that claimant performed meaningful work which benefited employer while she was employed in that position. Accordingly, the administrative law judge awarded claimant total disability benefits from October 28, 1996 to November 24, 1996, and permanent partial disability benefits, based upon two-thirds of the difference between claimant's average weekly wage and her post-injury wage-earning capacity, from November 25, 1996, and continuing. The administrative law judge then issued two Orders amending his decision to reflect claimant's entitlement to permanent partial disability benefits based upon a post-injury wage-earning capacity of $458.70 through March 23, 2003, and $333.60 thereafter.

On appeal, claimant challenges the administrative law judge's finding that she is not entitled to permanent total disability compensation; alternatively, claimant asserts that the administrative law judge erred in determining her post-injury wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

SUITABLE ALTERNATE EMPLOYMENT

Claimant initially contends that she is entitled to total disability benefits from November 25, 1996, and continuing, because her employment as a day-shift security guard constituted sheltered employment.[1] Where, as in the instant case, claimant establishes that she is unable to perform her usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions,

[1] No party challenges the administrative law judge's finding that claimant's employment as an evening-shift security guard constituted sheltered employment, and his consequent award of total disability benefits to claimant during that period of time, October 28, 1996 through November 24, 1996.

is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet this burden by offering claimant a job in its facility, including a light-duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Larson v. Golten Marine Co.*, 19 BRBS 54 (1986). The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is to be the exception, rather than the rule. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Ramirez v. Sea-Land Serv., Inc.*, 33 BRBS 41 (1999).

In his decision, the administrative law judge concluded that claimant's employment as a day-shift security guard constituted meaningful employment which benefited employer. Decision and Order at 10. The administrative law judge specifically found that claimant's day-shift position was previously occupied by another employee, that claimant replaced that employee upon his retirement, and that if claimant had not done so employer would have filled the position with another employee. The administrative law judge further found that claimant, during her approximate eight-year tenure in this position, also performed a number of financial transactions as well as a wide variety of administrative and logistical errands for employer, and that these duties were assigned to other employees when claimant was not available. In this regard, claimant testified that she performed security-related duties for employer in addition to writing weight tickets, filing paperwork, delivering payroll, and running errands as a courier, and that these duties were essentially the same as those performed by her predecessor in the day-shift security guard position. Tr. at 32-37, 63-68, 79-80, 85. Contrary to claimant's assertion on appeal, the fact that claimant and her predecessor were the only persons specifically employed by employer in this position and that these duties were assigned as needed to other employees does not establish that this employment was sheltered so long as the duties were necessary.[2] *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Accordingly, as the administrative law judge's finding that claimant's employment as a day-shift security guard, with additional assigned duties, constituted meaningful work which benefited employer, and that therefore that work was not sheltered, is rational and supported by substantial evidence, that finding and the administrative law judge's consequent denial of total disability benefits

[2] In this regard, Ms. Sacra, employer's administrative assistant and office manager, testified that employer employed only one full-time security guard and that the duties assigned to claimant upon her transfer to the day-shift security guard position had been previously performed by other employees. Tr. at 98, 101-104. Additionally, during claimant's absence, her non-security duties were assigned to other employees. *Id.* at 124-126.

during this period of employment is affirmed. *See Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

POST-INJURY WAGE-EARNING CAPACITY

Claimant next contends that the administrative law judge erred in calculating her post-injury wage-earning capacity. Specifically, claimant avers that the administrative law judge erred in finding that the wages she earned post-injury with employer as a day-shift security guard established her post-injury wage-earning capacity; rather, claimant argues that her post-injury wage-earning capacity should be based solely upon her ability to earn entry level wages as a non-skilled security guard. An award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c),(21) (h); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Section 8(h) of the Act provides that claimant's earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. 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); *see Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant in her injured condition. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The party contending that the employee's actual earnings are not representative of her wage-earning capacity bears the burden of establishing an alternative, reasonable, wage-earning capacity. *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

We affirm the administrative law judge's determination that claimant's actual wages while employed as a day-shift security guard for employer accurately establish her wage-earning capacity during the period of that employment. Initially, claimant's contention that her hourly rate as an evening-shift security guard was not representative of her wage-earning capacity is not germane to the issue; no party challenges the administrative law judge's finding that claimant's night-shift work constituted sheltered employment. Accordingly, the wage rate paid claimant during that employment is irrelevant to the issue of whether the wages paid claimant during her subsequent day-shift work fairly and reasonably represented her wage-earning capacity at that time. Moreover, it is undisputed that, while claimant's official job description was that of a security guard, claimant and her predecessor were assigned multiple clerical and courier duties in addition to their security-

related job activities and that employer paid claimant at a rate of $8.34 per hour for this job.[3] The administrative law judge thus specifically rejected claimant's argument that her post-injury work for employer was solely that of a security guard and found that claimant's post-injury work involved a significant percentage of clerical work. Therefore, he concluded that evidence regarding the wages paid to standard security guards was not particularly relevant, since the pertinent issue involved the reasonable wages paid to a person working in a hybrid position of security guard/clerk/courier. The administrative law judge found that employer's vocational expert, Ms. Favaloro, opined that the hourly rate paid to claimant during this period of time, $8.34, was a reasonable wage for the totality of the duties performed by claimant for employer post-injury, *see* RX 19 at 19-21, while claimant's vocational expert, Ms. Knight, declined to offer an opinion as to the wages to be paid on the open market for such a position. CX 5 at 40-50. Additionally, the administrative law judge found that claimant's decision to seek an increase in her hourly rate from employer as a result of the totality of her non-security related employment duties indicated that claimant herself did not believe that her wage rate was unreasonably high. *See* Tr. at 63. Determining that claimant failed to meet her burden of persuasion on this issue, the administrative law judge concluded that claimant's post-injury hourly rate of $8.34 fairly and reasonably represented her post-injury wage-earning capacity as a multi-tasked security guard. We affirm this conclusion, as it finding is rational and in accordance with law. *Cook,* 21 BRBS 4.

We agree with claimant, however, that the case must be remanded for further findings regarding the appropriate compensation rate to be paid to claimant based on these earnings. Subsections 8(c)(21) and 8(h) of the Act require that a claimant's post-injury wage-earning capacity be adjusted to represent the wages that the post-injury job paid at the time of claimant's injury in order to neutralize the effects of inflation. *See Walker v. Washington Metropolitan Area Transit Authority,* 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). In the instant case, however, at no point in his decision did the administrative law judge calculate a figure based on the hourly rate paid for the hybrid services of a security guard/courier/clerk by employer at the time of claimant's injury to be compared to claimant's pre-injury average weekly wage.[4] We therefore remand the case for

[3] Claimant's testimony at the formal hearing indicates that she continued to perform multiple tasks, in addition to her security duties, for employer through the date of her termination. Tr. at 70-78.

[4] Because the National Average Weekly Wage (NAWW) accurately reflects the increase in wages over time, the Board has held that the percentage increase in the NAWW for each year may be used to adjust the claimant's post-injury wages to the wages paid at the time of injury. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

the administrative law judge to calculate the wages paid to a person performing claimant's post-injury employment duties at the time of claimant's injury.

CLAIMANT'S DISCHARGE FROM LIGHT-DUTY EMPLOYMENT

Claimant challenges the administrative law judge's award of ongoing permanent partial disability compensation subsequent to her termination by employer on April 30, 2004; specifically, claimant avers that, as employer has not demonstrated the availability of suitable alternate employment following her termination, she is entitled to total disability compensation from that date. As set forth previously, employer in this case established the availability of suitable alternate employment by providing claimant a light-duty job at its facility. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT). In such a case, when employer makes that position unavailable to claimant through no fault of her own and she remains unable to perform her pre-injury work, employer must establish the availability of other suitable alternate employment in order to avoid liability for total disability. *Norfolk Shipbuilding & Dry Dock v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). In *Hord*, as in the present case, employer laid off the injured worker from a suitable post-injury position at its facility. The court concluded that, since employer made the suitable job unavailable, it bore a renewed burden of demonstrating the availability of other suitable alternate employment, as it could not satisfy its burden of showing suitable alternate employment by relying upon a position that was no longer available. *Hord*, 193 F.3d at 801, 33 BRBS at 172-173(CRT). Similarly, in *Vasquez*, 23 BRBS 428, and *Mendez*, 21 BRBS 22, the Board held that where an employer provided claimant with a job in its facility but then laid claimant off for economic reasons, employer 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), *rev'g* 25 BRBS 49 (1991).

In responding to claimant's appeal on this issue, employer contends that it need not identify a specific employment position suitable for claimant following claimant's April 30, 2004 release from employment; rather, employer avers that, in accordance with the holding of the United States Court of Appeals for the Fifth Circuit in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), it need only demonstrate the availability of general job openings suitable for claimant. *See* Emp. Br. at 31-32. In *P & M Crane*, the court stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one specific job opportunity and the general availability of other suitable positions, where the employer has established that the claimant "may have a reasonable likelihood of obtaining the single employment opportunity under appropriate circumstances." *P & M Crane Co.*, 930 F.2d at 431, 24 BRBS at 121(CRT). In *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (Sept. 19,

1994)(5th Cir. 1994)(unpublished),[5] the Fifth Circuit discussed its holding in *P & M* Crane, stating that *P & M Crane* establishes that more must be shown than the mere existence of a single job the claimant can perform; specifically, the court stated that in a case where one specific job has been identified and no general employment opportunities that were suitable alternatives for the claimant had been proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified.[6]

In the instant case, it is uncontroverted that light-duty suitable alternate employment at employer's facility became unavailable to claimant upon claimant's release by employer on April 30, 2004. The administrative law judge did not, however, address the availability of suitable alternate employment after that date but summarily continued claimant's award of ongoing permanent partial disability benefits. On remand, therefore, the administrative law judge must address the evidence of record and consider the issue of the extent of claimant's disability subsequent to April 30, 2004, consistent with the applicable case precedent addressing this issue.

[5] The rules of the Fifth Circuit state that unpublished opinions issued prior to January 1, 1996, are precedent. U.S. Ct. of App. 5th Circuit Rule 47.5.3.

[6] Employer's assertions regarding claimant's diligence in seeking employment after April 30, 2004, are misplaced, as claimant is not required to show she diligently sought alternate work until employer has carried its burden of establishing that such work is available. *See 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).

Accordingly, the administrative law judge's determination of claimant's post-injury wage-earning capacity is vacated, and the case remanded for reconsideration of this issue, as well as the extent of claimant's disability subsequent to her release from light-duty employment as of April 30, 2004, consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge