BRB No. 05-0180

DARIO MARTINEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: 10/13/200510/13/20052005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
		DECISION and ORDER

Appeal of Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Richard M. Fricke (Fricke & Solomon, PC), Newark, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-00275) of Administrative Law Judge Janice K. Bullard 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).

On March 7, 2003, claimant sustained injuries to his right knee, right wrist, and back while working for employer. Following this incident, claimant underwent physical therapy and was given braces for his wrist and knee. Claimant returned to work for employer on March 3, 2004, but he sustained a second work-related fall in late April 2004. Employer voluntarily paid temporary total disability benefits to claimant for the period of March 24, 2003, through July 21, 2003. 33 U.S.C. §908(b). Claimant sought additional disability compensation for the period of July 21, 2003, through March 2, 2004.

In her Decision and Order, the administrative law judge found that claimant's wrist and back conditions had resolved, and that although employer's physician imposed a zero percent disability rating on claimant's right knee, claimant is incapable of resuming his usual employment duties with employer due to his knee condition. Next, the administrative law judge determined that claimant's condition reached maximum medical improvement on July 21, 2003, and that employer's two labor market surveys, dated November 14, 2003 and February 3, 2004 respectively, established the availability of suitable alternate employment. Pursuant to these findings, the administrative law judge concluded that claimant has not established that he is entitled to permanent or temporary total disability compensation, that claimant's disability is limited to a scheduled body part pursuant to Section 8(c) of the Act, and that claimant is thus limited to the compensation previously paid to him by employer. Accordingly, the administrative law judge denied claimant's claim for total disability benefits for the period July 21, 2003, through March 2, 2004. Decision and Order at 16-24.

On appeal, claimant challenges the administrative law judge's denial of his request for compensation during the period of July 21, 2003, through March 2, 2004. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56 (1985). Determining the date on which a claimant's disability reached maximum medical improvement goes to the nature of a claimant's disability, that is, whether that disability is temporary or permanent, while demonstrating the availability of suitable alternative employment establishes that a disability has become partial rather than total in extent. *See Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied,* 498 U.S. 1073 (1991); *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991)(decision on recon.). In the instant case, as no party challenges the administrative law judge's findings that claimant reached maximum medical

improvement as of July 21, 2003, and that employer established the availability of suitable alternate employment,[1] those findings are affirmed.

Claimant asserts, however, that the administrative law judge erred in finding claimant was only partially disabled as of the date that claimant's condition reached maximum medical improvement, July 21, 2003. Specifically, claimant contends that as the reports of employer's vocational expert documenting the availability of suitable alternate employment are dated subsequent to the date on which permanency was established, July 21, 2003, the administrative law judge erred in concluding that the extent of claimant's disability converted from total to partial as of that date. We reject this contention, since the evidence supports a finding that suitable jobs were available on July 21, 2003.

It is well established that a showing of suitable alternate employment does not automatically apply retroactively to the date that the injured employee reached maximum medical improvement. Rather, where, as in the instant case, it is undisputed that claimant cannot return to his usual work and employer established the availability of suitable alternate employment, claimant's total disability becomes partial on the earliest date that the suitable employment is shown to have been available. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Rinaldi*, 25 BRBS 128. Employer may submit a retrospective survey to establish that jobs were available at an earlier date than that of the survey. *Id.*

In the instant case, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment based on the reports of employer's vocational expert, Mr. Sans, listing specific positions suitable for and available to claimant. Emp. Exs. 8, 9; Decision and Order at 22. After determining that claimant did not diligently seek employment post-injury, the administrative law judge concluded that claimant failed to establish that he was totally disabled between July 21, 2003, and his return to work in early March 2004, and she thus denied the additional benefits sought by claimant. While, as claimant asserts on appeal, the labor market surveys undertaken by Mr. Sans and relied upon by the administrative law judge are dated subsequent to July 21, 2003, *see* Emp. Exs. 8, 9, Mr. Sans' February 3, 2004, labor market survey unequivocally states that he maintained contact with the employers documented in his surveys and lists the specific employers who had job openings from July 21, 2003 through November 14, 2003, when the initial labor market survey was generated. Emp. Ex. 9. The administrative law judge specifically discussed and credited these jobs. Decision and Order at 19-20, 22. As the credited vocational evidence

[1] In this regard, the administrative law judge relied upon the labor market surveys prepared by Mr. Sans, employer's vocational expert. Decision and Order at 19-23.

establishes that the jobs were available as of July 21, 2003, we affirm her determination that claimant's total disability became partial in extent on that date.[2]

Claimant also avers that the administrative law judge erred in failing to award permanent partial disability compensation during the period of July 21, 2003, to March 2, 2004, for his loss of wage-earning capacity under Sections 8(c)(21) and (h) of the Act, 33 U.S.C. §908(c)(21), (h). This argument is without merit. Claimant does not challenge the administrative law judge's finding that the medical evidence establishes that claimant's back and wrist conditions have resolved and that his present disability is limited to his right knee. Decision and Order at 18, 23. Permanent partial disability for a knee injury arising under the Act must be compensated pursuant to the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2). *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). In such cases, Section 8(c)(21) does not apply, compensation is limited to that set forth in the schedule, and economic factors are not relevant since payments made under the schedule presume a loss in wage-earning capacity. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915(CRT) (4th Cir. 1998); *Henry v. Geo. Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). Therefore, as claimant's permanent partial disability in the instant case falls solely under the schedule, he is precluded from receiving benefits for a wage loss pursuant to Section 8(c)(21) of the Act. *PEPCO*, 449 U.S. 268, 14 BRBS 363; *see Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002). Accordingly, claimant's recovery for permanent partial disability, if any, is limited to a scheduled award.[3]

[2] Claimant's argument that the jobs were not available because they were not communicated to him prior to the hearing is rejected, as such communication is not required in order for jobs to be available for purposes of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Fortier v. Electric Boat Corp.*, 38 BRBS 67 (2004).

[3] In her Decision and Order, the administrative law judge did not award claimant benefits pursuant to Section 8(c)(2), and claimant does not assert error in this regard.

Accordingly, the administrative law judge's Decision and Order denying additional 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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REGINA C. McGRANERY
Administrative Appeals Judge