

WENDY FORTIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 12/14/2004
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Peter D. Quay (Murphy and Beane), New London, Connecticut, for self-insured employer.

Andrew J. Schultz (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-LHC-0982) of Administrative Law Judge Larry W. Price 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). The Board heard oral argument in this case on September 21, 2004, in Boston, Massachusetts.

Claimant sustained work-related injuries to her left shoulder in 1990 and 1991, while working as an outside electrician for employer. Following each incident, claimant returned to her usual work for employer without restrictions, and continued to work in that capacity until 1995, when she sustained an injury to her hands, arms, and shoulders, with acute pain in her right upper extremity. After treatment at employer’s hospital facility, claimant again returned to her customary work, predominantly using her left hand, until it too developed severe pain and swelling. The doctor at employer’s hospital facility informed claimant at that time that she needed to find another job.

Claimant subsequently underwent several months of physical therapy outside of employer’s facility, but continued to have pain, swelling and aching in her hands and sometimes in her shoulders. She was given restrictions of no lifting over five pounds, no pushing, no pulling, no overhead work and no repetitive use of the hands. Employer thereafter provided claimant with light-duty work on tank watch, and claimant continued to work for employer until she was laid off in 1998.

Claimant then obtained temporary work installing electrical components onto circuit boards, but after a few weeks of this employment, which involved repetitive overhead work outside her restrictions, claimant’s hand and shoulder pain progressed to numbness. In June 1999, claimant underwent surgery to repair her left rotator cuff and left trigger thumb, and in March 2001, she underwent tendon release surgery on her left hand in an unsuccessful attempt to correct persistent pain in her left hand and wrist. On November 14, 2001, claimant’s treating physician, Dr. Goldstein, released her to light-duty work with restrictions of no lifting, pushing or pulling over twenty pounds and minimal repetitive hand use.

Claimant, with the assistance of Karen Davis, a vocational rehabilitation counselor, thereafter began looking for permanent, full-time work. Through a temporary employment agency, claimant obtained work at a jewelry factory but found, after one day, that she could not continue in this job because the work caused her fingers to get stiff. Similarly, claimant was unable to continue in a position that she had independently found at an embroidery factory because it caused excessive soreness in her fingers. Subsequently, claimant, despite a continued job search, has been unable to find suitable work as she either lacked the requisite experience or was overqualified for the limited positions that she was physically capable of performing. Employer, which voluntarily paid periods of temporary partial and total disability benefits, terminated claimant’s total disability benefits based on its labor market survey dated March 26, 2003.

In his decision, the administrative law judge determined that only the security guard positions listed in employer's labor market survey might constitute suitable alternate employment. Nevertheless, he determined that as claimant, despite the exercise of due diligence, has been unsuccessful in obtaining any form of suitable alternate employment, she is totally disabled. Consequently, the administrative law judge awarded claimant permanent total disability benefits from November 19, 2001, and continuing.<sup>1</sup>

On appeal, employer challenges the administrative law judge's award of ongoing total disability benefits. Claimant and the Director, Office of Workers' Compensation Programs (the Director), each respond, urging affirmance of the administrative law judge's decision.

Employer initially asserts that the administrative law judge placed upon it too high of a burden to establish the availability of suitable alternate employment and did not properly apply the standard enunciated by the United States Court of Appeals for the Second Circuit in *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2<sup>d</sup> Cir. 1991). Employer contends that, in contrast to the administrative law judge's findings, it is not required to find an actual job offer for claimant, and that pursuant to *Palombo* it has, via its labor market survey, established the existence of jobs for which claimant could compete and realistically and likely secure. The Director avers that even though the administrative law judge did not mention *Palombo* by name, his decision reflects an application of the appropriate standard. Moreover, the Director maintains that the administrative law judge's findings regarding suitable alternate employment are supported by substantial evidence.

Where, as in the instant case, a claimant has established that she is unable to perform her usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to demonstrate within the geographic area where claimant resides the availability of jobs which claimant, by virtue of her age, education, work experience and physical restrictions is capable of performing and for which she can compete and reasonably secure. *Pietruni v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT) (2<sup>d</sup> Cir. 1997); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981).

In his decision, the administrative law judge found that jobs in customer service and as a cashier identified in employer's labor market survey were not suitable for claimant, but that claimant was physically capable of performing security guard work. In setting out the applicable standard for this issue, the administrative law judge observed

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<sup>1</sup>The parties stipulated that claimant reached maximum medical improvement with regard to her work-related injuries as of November 19, 2001.

that although an “employer need not place the claimant in suitable alternate employment,” it “must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant’s local community,” and that the “specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions.” Decision and Order at 17-18. In addition, the administrative law judge noted that an employer “may rely on the testimony of vocational experts to establish the existence of suitable jobs,” but that the “counselors must identify specific, available jobs; market surveys are not enough.” Decision and Order at 18.

In *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT), the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, set out a three-step burden-shifting scheme to be applied in analyzing total disability claims under the Act. Relevant to the instant case are the second and third steps, under which once claimant establishes a *prima facie* case, the burden shifts to employer to establish the availability of suitable alternate employment, which claimant can the rebut by demonstrating a diligent, yet unsuccessful, post-injury job search. In addressing the second step, *i.e.*, the availability of suitable alternate employment, the Second Circuit held that employer “must merely establish the existence of jobs open in the claimant’s community that he could compete for and realistically and likely secure.” *Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT). Observing that employer’s “burden to show suitable alternate employment is a limited, evidentiary one,” the court held that employer does not have to “become, in effect, an employment agency for the claimant,” by finding “an actual job offer for the claimant,” or even “convey to claimant information about currently available jobs,” as that “would place an unreasonable burden on the employer and also run counter to the rehabilitative goals of the Act by discouraging claimants from actively searching for alternative employment themselves.” *Palombo*, 937 F.2d at 74-75, 25 BRBS at 6-7(CRT). In reaching this determination, the Second Circuit cited decisions authored by the Fourth, Fifth and Ninth circuits. *See Palombo*, 937 F.2d at 75-76, 25 BRBS at 7-8(CRT), *citing Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5<sup>th</sup> Cir. 1991); *News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988); and *Turner*, 661 F.2d 1031, 14 BRBS 156. In a subsequent decision, the Second Circuit reiterated that an employer may not meet its burden of establishing suitable alternate employment merely by illustrating that claimant can perform particular physical tasks; employer, while not an employment agency for claimant, must demonstrate jobs for which claimant can realistically compete. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT).

While, as employer correctly notes, the administrative law judge’s decision lacks any reference to or discussion of *Palombo*, the administrative law judge nevertheless applied the appropriate standards in addressing the suitable alternate employment issue.

Specifically, as set out above, the language employed by the administrative law judge in articulating the relevant standard captures the essence of the holding in *Palombo*, as his standard rests on the same judicial precedents as the decision reached in *Palombo*. *Compare* Decision and Order at 17-18 *with Palombo*, 937 F.2d at 75-76, 25 BRBS at 7-8(CRT).

The administrative law judge then looked at the specific jobs listed in employer's labor market survey, *i.e.*, positions as a security guard, cashier, and customer service representative, in conjunction with the deposition testimony of Elizabeth Sinatro, the vocational case manager who conducted the survey, and the post-injury restrictions imposed by Dr. Goldstein.<sup>2</sup> The administrative law judge initially rejected the position of customer service representative based on Ms. Sinatro's concession that said position did not fit within claimant's restrictions. Employer's Exhibit (EX) 6 at 17; Decision and Order at 18. The administrative law judge also rejected the cashier positions as they involve constant scanning and lifting of items, and thus require consistent repetitive hand, arm and wrist movements which fall beyond the restrictions imposed by Dr. Goldstein.<sup>3</sup> Decision and Order at 19. The administrative law judge, however, concluded that employer established claimant's ability to perform suitable alternate employment via the security jobs listed in the labor market survey. We hold that the administrative law judge's consideration of employer's evidence of suitable alternate employment was conducted pursuant to the appropriate standards. Furthermore, we affirm his specific findings regarding this evidence, *i.e.*, his rejection of the customer service and cashier

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<sup>2</sup>Dr. Goldstein opined, on January 21, 2002, that claimant had permanent restrictions, including no reaching above the left shoulder, no repetitive movement of the wrists, or pushing, pulling and/or lifting of more than twenty pounds for more than one hour a day, and no twisting for more than two hours a day. Claimant's Exhibit 24.

<sup>3</sup>Employer correctly avers that the administrative law judge's concern regarding the unavailability of the specific cashier positions listed in the labor market survey at the time when claimant was furnished a copy of the survey is not relevant to the resolution of the suitable alternate employment issue. *Palombo*, 937 F.2d at 74-75, 25 BRBS at 6-7(CRT) (employer is not required to "convey to claimant information about currently available jobs."); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988) (jobs need only be available at the critical time when claimant is able to work). Nonetheless, the administrative law judge's misstatement is harmless as his rejection of the cashier position as suitable alternate employment rests solely on his finding that said work is beyond claimant's post-injury restrictions. *See* Decision and Order at 19. Moreover, the administrative law judge also found that even if the cashier position was suitable alternate employment, "claimant has established that she has been unable to obtain this employment even through the exercise of reasonable diligence." Decision and Order at 20.

jobs, and determination that the security positions are suitable for claimant, as they are supported by substantial evidence. *Pietrunti*, 119 F.3d at 1041, 31 BRBS at 88(CRT); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

Employer next argues that the administrative law judge erred in finding that claimant rebutted its showing of suitable alternate employment. Employer again asserts that the administrative law judge did not apply *Palombo*. Specifically, employer maintains that the administrative law judge's cursory review of the efforts made by claimant in searching for post-injury employment, absent any consideration of the actual sufficiency of claimant's efforts, is not in accordance with the *Palombo* standard. Moreover, employer maintains that claimant's evidence regarding her post-injury job search is not specific enough to meet her affirmative burden pursuant to *Palombo*. In contrast, the Director maintains that the administrative law judge's findings regarding claimant's diligent job search are supported by substantial evidence.

Claimant can rebut employer's showing of the availability 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*, 937 F.2d 70, 25 BRBS 1(CRT); *see also Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 479 U.S. 826 (1986). 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.' *Turner*, 661 F.2d at 1043, [14 BRBS at 165]." *Palombo*, 937 F.2d at 74, 25 BRBS at 7(CRT). The *Palombo* court further indicated that when claimant offers evidence that she diligently tried to find a suitable job, the administrative law judge must consider this evidence and make specific findings regarding the nature and sufficiency of claimant's efforts. *Palombo*, 937 F.2d at 75-76, 25 BRBS 8-9(CRT).

In addressing this issue, the administrative law judge found that claimant had been diligent in seeking employment, both with the assistance of vocational counselors and labor market surveys, and on her own. The administrative law judge, after adjudging claimant to be a credible witness, considered her testimony regarding her post-injury job search as it related to the work identified by employer's labor market survey, as well as to other similarly suited occupations. The administrative law judge found that claimant contacted a number of the prospective employers listed in the labor market survey about post-injury employment, *e.g.*, security guard positions at Shaw's Supermarket, Pinkerton Security, the Providence Biltmore Hotel, and the Ann & Hope Outlet, and cashier positions at Shaw's Supermarket, Comp/USA, CVS and Home Depot, *see CX 27* at 6, 9-

11, 16; HT at 29-31, and, in fact, filed applications with those employers who had positions available but was unable to obtain employment. *Id.* The administrative law judge also found that claimant searched for employment within her post-injury restrictions at places not listed on the labor market survey having attended at least one job fair, Claimant's Exhibit (CX) 27 at 20, and by having contacted "every temp agency in the phone book," and all the jobs she felt that she could do "through the newspaper" and "on the internet." HT at 26; Decision and Order at 20. The administrative law judge determined that claimant had specifically applied for jobs as a delivery driver at a box-making company, a machine operator at a manufacturing company, and as an apprentice trainee doing door-to-door vacuum cleaner sales, and had obtained only one offer which she was compelled to decline because it entailed the regular lifting and carrying of 25-30 pound vacuum cleaners. CX at 16-19. In addition, the administrative law judge found that claimant, on two separate occasions, obtained employment through a temporary agency, only to find in each instance after one day, that the work was too physically demanding for her post-injury condition. HT at 27-28; Decision and Order at 20. Moreover, the administrative law judge found that claimant's willingness to obtain employment is further evidenced by her recent decision to begin selling Avon products.<sup>4</sup> Decision and Order at 20; CX 27 at 20-24.

The administrative law judge further found that Ms. Davis's impressions support claimant's testimony and thus similarly support his finding that claimant put forth a good faith effort in seeking post-injury employment. Ms. Davis repeatedly acknowledged that claimant "is making a good faith effort to look for various employment opportunities," CX 26 at 26-27, 30, 33, as evidenced by her efforts in "continu[ing] to seek out any available positions," *id.* at 26-30; *see also* CX 26 at 28-29, 33, and in applying for various positions. *Id.* In this regard, Ms. Davis stated that claimant "has completed applications at approximately thirteen temporary to permanent placement agencies in her local area," *id.* at 26-27, she has additionally contacted a number of "school departments, retail business, fast food restaurants, and local jewelry companies," *id.* at 29, and that she "has attempted on two occasions to perform the work that she would be hired for, but then was able to determine that she was [physically] unable to do this." *Id.* at 30. Ultimately, on October 10, 2002, Ms. Davis recommended closing claimant's file and indicated that claimant "can continue to look for work on her own," as she "continues to make a good faith effort to look for work," and "has the knowledge and abilities to seek employment on her own." *Id.* at 33.

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<sup>4</sup>The administrative law judge determined, however, that the Avon position is a speculative venture and as such "does not fit within the category of suitable alternate employment." Decision and Order at 20. Employer, while noting that this "speculative" finding is arbitrary, does not challenge this determination. Employer's brief at 10.

The administrative law judge's finding that claimant's evidence of her ongoing efforts to secure alternative employment is sufficient to establish that she made diligent efforts to secure a position is rational and supported by substantial evidence. See *Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT); see also *DM & IR Railway Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8<sup>th</sup> Cir. 1998). In contrast to employer's assertion, the administrative law judge's analysis is, again, consistent with the *Palombo* standard: he extensively discussed the particular jobs relied upon by claimant, and considered both the nature and sufficiency of claimant's efforts, see Decision and Order at 7-9, 13-14, 19-20, in determining whether claimant was genuinely seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. See *Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT). As credibility determinations are solely within the purview of the administrative law judge, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961), and as his decision to accord determinative weight to claimant's testimony and the vocational reports of Ms. Davis is rational, see *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962), the administrative law judge's finding that claimant undertook a diligent yet unsuccessful post-injury job search and thus rebutted employer's showing of suitable alternate employment is affirmed. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). Consequently, the award of ongoing permanent total disability benefits is affirmed.

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