BRB No. 99-0966

PASCAL CAPPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (98-LHC-1995/1996) of Administrative Law Judge David W. DiNardi 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 if they are supported by substantial evidence, are rational and are in accordance with law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipfitter, was injured during the course of his employment on September 16, 1992. Claimant returned to work with employer on November 30, 1992, with physical restrictions on his lifting and bending. On January 6, 1995, claimant was involved in a general economic layoff. Claimant subsequently obtained part-time work on his own initiative, and the parties stipulated that his residual wage-earning capacity is $200 per week.

Claimant sought disability benefits under the Act for the period following his layoff.

In his decision, the administrative law judge found, *inter alia*, that claimant was incapable of resuming his usual work as a shipfitter following his September 16, 1992 injury, that claimant returned to work with employer on November 30, 1992, and that the economic loss suffered by claimant following his layoff on January 6, 1995, is the result of his work injury; thus, the administrative law judge concluded that claimant was entitled to temporary total disability compensation for the period of September 18, 1992 through November 29, 1992, and temporary partial disability compensation from January 7, 1995, and continuing. *See* 33 U.S.C. §908(b), (e).

On appeal, employer challenges the administrative law judge's award of benefits subsequent to November 29, 1992, contending that claimant failed to establish a *prima facie* case of disability. Claimant has not responded to this appeal.

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 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant demonstrates an inability to return to his usual work, employer may prove that claimant is at most partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet its burden by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Larsen v. Goltten Marine Co.*, 19 BRBS 54 (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).

For the reasons that follow, we affirm the administrative law judge's finding on this issue. After setting forth the testimony of both claimant and his medical providers following his September 16, 1992, work injury, the administrative law judge concluded that, based upon the totality of the record, claimant established that he could not return to work as a shipfitter. *See* Decision and Order at 20. The record reflects that following the September 16, 1992, work incident, claimant reported to employer's clinic and was placed on light duty with the following restrictions: no repeated bending, twisting, overhead work, and no lifting greater than 20 pounds for five days. *See* CXS 5A, 5B. On September 18, 1992, claimant was treated at St. Joseph Hospital where he was advised to avoid climbing, bending, stooping or lifting. *See* CXS 5C, 5D. Dr. Fortuna, claimant's treating physician, thereafter opined on November 20, 1992, that claimant could return to work on November 30, 1992, but would require help with heavy lifting. *See* CX 5J. On November 24, 1992, Dr. Greenberg

examined claimant and opined that claimant could return to work on November 30, 1992, with restrictions on no repeated bending and no lifting above 25 to 30 pounds for a period of 3 to 4 weeks. *See* EX 13. Consistent with this diagnosis, employer's clinic reported on November 30, 1992, that claimant could return to work with the restriction of no heavy lifting above 25 pounds for 3 weeks. *See* CX 5I.

In addressing his return to work on November 30, 1992, claimant testified that his employment duties pre-injury as a shipfitter included the building of decks and bulkheads; claimant described this work as involving the fitting, grinding, lifting and laying out of parts weighing in excess of 50 pounds. *See* Tr. at 45, 61-68. Following his return to work on November 30, 1992, however, claimant testified that the nature of his job changed significantly; specifically, claimant stated that he was assigned primarily painting, sweeping, folk-lift driving, stock checking and small job fitting work in acknowledgment of his back condition, asserting his supervisor was aware of this condition via employer's clinic's return to work slip.[1] *See id.* at 69-73. In arriving at his decision, the administrative law judge is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988). In the instant case, the evidence of record, including claimant's testimony, regarding claimant's return to work on November 30, 1992, with restrictions is uncontroverted; accordingly, we affirm the administrative law judge's finding that claimant was unable to return to his usual employment duties with employer as that determination is rational and supported by substantial evidence of record. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Lastly, employer asserts that it is "noteworthy" that the administrative law judge awarded claimant no benefits between November 30, 1992, the day on which claimant returned to work, and January 6, 1996, the day of claimant's lay-off. Where, as in the instant case, 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 & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23

[1]Claimant conceded that on occasion he performed painting, sweeping and folk-lift driving duties pre-injury; claimant testified, however, that these duties became prevalent following his return to work in November 1992.

BRBS 428 (1990). Thus, in the case at bar, as employer provided claimant with a light duty position which resulted in no loss of wage-earning capacity, claimant was not entitled to additional benefits under the Act. Upon his lay-off from the light duty job, however, claimant sustained a work-related loss in wage-earning capacity. Accordingly, the administrative law judge's award of temporary partial disability compensation to claimant subsequent to claimant's layoff is in accordance with law.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge