BRB Nos. 00-0955
and 00-0955A

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| WILLIAM N. GATES | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
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| DEL MONTE FRESH PRODUCE | ) | DATE ISSUED: June 20, 2001 |
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| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

G. Mason White and James D. Kreyenbuhl (Brennan, Harris & Rominger, L.L.P.), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (99-LHC-227, 228) of Administrative Law Judge Richard T. Stansell-Gamm 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).

On June 1, 1995, claimant injured his left wrist during the course of his employment as a forklift driver/warehouseman. Claimant underwent surgery on his wrist on March 27, 1996, and December 17, 1996. Claimant was released to return to work without restrictions by Dr. Rehak on April 4, 1997, who opined that claimant has a three percent permanent impairment of the left wrist. Claimant sustained a second work-related injury to his neck, back, and left foot and ankle on February 5, 1996. Claimant received treatment for his left foot and ankle injuries in March 1996. Subsequently, claimant received treatment from St. Joseph's Health Center/Garden City Lifeline (Lifeline) for neck and back pain in June 1997, and he was referred by Lifeline to Dr. Collier for additional treatment. On July 11, 1997, employer's facility closed. After examining claimant on October 21, 1998, Dr. Collier opined that, as a result of his February 5, 1996, work injury, claimant sustained a two percent permanent impairment of his left ankle and a five percent neck impairment. Dr. Collier also stated that claimant is capable of light duty work with lifting restrictions. Claimant obtained employment as a package store clerk for the month of June 1998, which paid $105 per week. Claimant subsequently obtained employment with Sizemore Security as a security guard on October 22, 1998, at the wage of $333.66 per week.

In his decision, the administrative law judge found that, due to his June 1, 1995, wrist injury, claimant is entitled to compensation for a three percent impairment of his left arm, 33 U.S.C. §908(c)(1), and that, due to his February 5, 1996, work injury, claimant is entitled to compensation for a two percent impairment of his left foot, 33 U.S.C. §908(c)(4). The administrative law judge determined that claimant was unable to return to his usual employment after his February 5, 1996, work injury, and that the light duty work claimant subsequently performed for employer established the availability of suitable alternate employment until July 11, 1997, when employer's facility closed. In the absence of any evidence of suitable alternate employment, the administrative law judge awarded claimant compensation for temporary total disability from July 11, 1997, to March 15, 1998, 33 U.S.C. §908(b), at which date the parties stipulated that claimant's neck, back, and left foot conditions reached maximum medical improvement; thereafter, the administrative law judge awarded claimant compensation for permanent total disability from March 16, 1998, to May 31, 1998, 33 U.S.C. §908(a). Finally, the administrative law judge awarded claimant continuing compensation for permanent partial disability based on a loss of wage-earning capacity commencing on June 1, 1998, 33 U.S.C. §908(c)(21). The administrative law judge determined claimant's loss of wage-earning capacity by subtracting from claimant's average weekly wage of $380, claimant's weekly wage of $333.66 as a security guard.

On appeal, claimant challenges the administrative law judge's finding that his permanent partial disability award, based on his earnings as a security guard, commenced on

June 1, 1998, as claimant did not obtain this job until October 22, 1998. Claimant also contends he is entitled to total disability benefits from July 1, 1998 until he obtained the security guard position. Employer responds, urging rejection of claimant's contentions. Employer cross-appeals, contending the administrative law judge erred in finding that claimant was unable to return to his usual employment after his work injuries. Employer further contends there is no evidence that claimant lost any wages due to his work injuries after employer closed its facility on July 11, 1997. Claimant responds, urging affirmance of the administrative law judge's compensation awards for total disability and permanent partial disability based on a loss of wage-earning capacity.

We initially address employer's challenge to the administrative law judge's finding that claimant is unable to perform his usual employment as a forklift driver/warehouseman. Specifically, employer contends that the absence of neck and back pain complaints due to the February 5, 1996, work injury until June 5, 1997, approximately five weeks prior to the announced closing of employer's facility on July 11, 1997, and claimant's testimony that he drove a forklift for employer until his employment terminated on July 11, 1997, establish that claimant is able to perform his usual employment. 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 must show that he is unable to perform his usual work due to his work injury. *See Harmon v. Sea-Land Service*, 31 BRBS 45 (1997); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In his decision, the administrative law judge credited the opinion of Dr. Collier that claimant is unable to tolerate the repetitive neck movement involved with driving a forklift. CX 5. The administrative law judge noted claimant's testimony that he operated a forklift during the period after his February 1996 injury and before employer closed its facility in July 1997; however, the administrative law judge credited evidence that a Lifeline physician placed claimant on restricted duty in June 1997and that employer had placed claimant on light duty after his June 1, 1995, and February 5, 1996, work injuries. *See* CX 14; Tr. at 50, 53-54, 64, 101-102, 105-106. In the instant case, we hold that the administrative law judge's decision to credit the testimony of claimant, the opinion of Dr. Collier, and claimant's medical records from Lifeline is rational, and his finding that claimant cannot perform his usual work is supported by substantial evidence. We therefore affirm the administrative law judge's determination that claimant is incapable of resuming his pre-injury work as a forklift driver/warehouseman.[1] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS

[1]We note that any error in the administrative law judge's finding that *employer* presented insufficient evidence that claimant could return to his usual employment is harmless, as the administrative law judge explicitly found that claimant established his *prima*

119(CRT) (4th Cir. 1997).

Employer also challenges the administrative law judge's award of benefits for total disability from July 11, 1997, to May 31, 1998. Specifically, employer contends that, since the administrative law judge found that claimant's actual employment with employer constituted suitable alternate employment, and claimant was discharged by employer due to the closing of its facility and not for any reason related to claimant's work injuries, any subsequent loss of wage-earning capacity after employer closed its facility is not compensable. Once a claimant establishes that he cannot return to his usual work, as here, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer can meet its 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); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where employer establishes suitable alternate employment by providing claimant light-duty work which he successfully performs, but subsequently withdraws this work due to no fault of claimant's, claimant is entitled to compensation for total disability absent evidence of the availability of other suitable employment. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

Contrary to employer's contention, the administrative law judge properly rejected employer's contention that, pursuant to *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), claimant's discharge relieved employer from any further compensation liability. In *Brooks*, the claimant was discharged for breaching company rules. Under such circumstances, employer does not bear a renewed burden of establishing other suitable alternate employment. *Id*. The administrative law judge found *Brooks* distinguishable from the present case because claimant's discharge was not related to a violation of company rules or any other misconduct on his part. The administrative law judge found that in order to avoid liability for total disability, employer must establish new suitable alternate employment from the date of claimant's discharge on July 11, 1997, since claimant was terminated for

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*facie* case of total disability. Decision and Order at 15.

reasons unrelated to any action on his part and he remains physically unable to perform his former employment as a forklift driver/warehouseman. The administrative law judge concluded that, in the absence of any evidence of suitable alternate employment after claimant's discharge, claimant is entitled to compensation for total disability from July 11, 1997, to May 31, 1998. Inasmuch as the administrative law judge's findings of fact are supported by substantial evidence, and his conclusion comports with law, we affirm the administrative law judge's finding that claimant is entitled to compensation for total disability until he obtained employment as a package store clerk on June 1, 1998. *Hord*, 193 F.3d 836, 33 BRBS 170(CRT); *Mendez*, 21 BRBS 22.

Employer also challenges the administrative law judge's award for permanent partial disability based on a loss of wage-earning capacity. Claimant contends in his appeal that the administrative law judge erred by commencing the permanent partial disability award on June 1, 1998, based on his post-injury earnings as a security guard, a job he did not obtain until October 22, 1998. Claimant contends that he is entitled to compensation for permanent partial disability from June 1 to June 30, 1998, based on his actual wage loss that month when he was employed as a package store clerk at an average weekly wage of $105. Claimant also contends he is entitled to compensation for permanent total disability when he was unemployed from July 1, 1998, to October 21, 1998.

Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). If they do not, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). In either case, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can do post-injury. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985), *aff'g* 16 BRBS 282 (1984).

Based on claimant's vocational history, the administrative law judge found that claimant was overqualified for the job as a store clerk and that claimant's actual wages of $105 per week are not representative of his post-injury wage-earning capacity. The administrative law judge found that the availability of jobs in the Savannah area improved in June 1998 based on claimant's obtaining employment that month as well as in October 1998, after being unemployed since July 1997. Based on claimant's vocational history and level of education, the administrative law judge found that claimant's weekly wage of $333.66 as a security guard

establishes claimant's post-injury wage-earning capacity. The administrative law judge therefore awarded claimant continuing compensation for permanent partial disability based on a loss of wage-earning capacity of $46.34 from June 1, 1998, when claimant found work as a package store clerk.

We reject employer's contention that claimant is not entitled to any permanent partial disability benefits. We have affirmed the administrative law judge's finding that the burden remained with employer to establish suitable alternate employment after employer's facility closed. *See Hord*, 193 F.3d 836, 33 BRBS 170(CRT). Claimant obtained alternate employment on his own initiative. He therefore is entitled to permanent partial disability benefits for any loss in wage-earning capacity, based on the difference between his average weekly wage with employer and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h).

We cannot affirm, however, the administrative law judge's finding that the wages claimant earned as a security guard beginning on October 22, 1998, should be used to establish claimant's wage-earning capacity at an earlier time. Contrary to the administrative law judge's finding, there is no evidence of record that the local job market in Savannah improved in June 1998, and the administrative law judge's inference based on claimant's obtaining two jobs within a few months is not rational. Claimant testified that he obtained the store clerk position through personal contacts. Tr. at 69. This job lasted for only one month, as claimant lost the position due to the owner's financial difficulties. Tr. at 70-71. Employer did not submit any evidence that this, or any other type of employment, was realistically and regularly available to claimant on the open market. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). In the absence of any evidence concerning other suitable employment, employer has not demonstrated that claimant had a higher wage-earning capacity than the wages he earned in the store clerk position. *See Burch v. Superior Oil Co.*, 15 BRBS 423 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Thus, the store clerk position establishes only that claimant was not totally disabled during the time he held the job, and the wages for this job establish claimant's wage-earning capacity only for the job's duration.

Moreover, notwithstanding claimant's qualifications and work experience, claimant's testimony and the evidence of record are uncontradicted that he diligently sought work until he obtained permanent employment as a security guard on October 22, 1998. Tr. at 67-71; CX 19. As with the store clerk position, employer did not present any evidence that security guard positions were regularly available on the open market prior to the time claimant obtained his job. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT). Accordingly, in the absence of any evidence that claimant's actual wages starting on October 22, 1998, represent claimant's wage-earning capacity on the open market from June 1,

1998, to October 21, 1998, we vacate the administrative law judge's compensation award for permanent partial disability from June 1, 1998, to October 21, 1998, based on a loss of wage-earning capacity of $46.34 per week. Claimant is entitled to compensation for permanent partial disability from June 1, 1998, to June 30, 1998, based on the difference between claimant's average weekly wage for employer of $380 and claimant's actual wages as a package store clerk of $105, which corresponds to a loss of wage-earning capacity of $275 per week. From July 1 through October 21, 1998, claimant is entitled to permanent total disability benefits. Beginning October 22, 1998, claimant is entitled to permanent partial disability benefits of $46.34 per week, as awarded by the administrative law judge.

Accordingly, the administrative law judge's Decision and Order awarding compensation for permanent partial disability from June 1, 1998, to October 21, 1998, based on a loss of wage-earning capacity of $46.34 per week is vacated. The decision is modified to award claimant compensation for permanent partial disability from June 1, 1998, to June 30, 1998, based on a loss of wage-earning capacity of $275, and for permanent total disability from July 1, 1998, to October 21, 1998, based on an average weekly wage of $380. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge