



BRB No. 14-0360

DON MARSHALL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BOLLINGER SHIPYARDS,)	
INCORPORATED)	
)	DATE ISSUED: <u>June 29, 2015</u>
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Pete Lewis and Barry W. Sartin, Jr. (Lewis & Caplan), New Orleans, Louisiana, for claimant.

Edward S. Johnson and Christopher L. Williams (Johnson, Johnson, Barrios & Yacoubian), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Motion for Reconsideration (2013-LHC-00983) 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law.

33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his neck while working as a shipfitter for employer on April 29, 2010. Claimant was able to continue working in a modified job, but employer terminated his employment on August 1, 2011. Claimant remained unemployed until February 7, 2013, when he obtained a temporary job at Walmart; the Walmart job ended on September 26, 2013.¹ Employer conceded that the medical evidence indicates claimant is unable to return to his original job because of his work injury, and claimant did not dispute that employer identified suitable alternate employment as of December 3, 2012, paying an average wage of \$13.41 per hour. Claimant contended, however, that he was unable to obtain work until he was hired by Walmart on February 13, 2013, despite his diligent, good-faith efforts at applying for the jobs identified by employer. Finding that claimant’s job search was diligent, the administrative law judge awarded claimant total disability benefits from August 1, 2011, when employer terminated his employment, until April 7, 2014, when claimant obtained a regular job at Lowes,² except for the period during which claimant worked for Walmart. The administrative law judge awarded claimant partial disability benefits during the period he worked for Walmart, as well as ongoing partial disability benefits from April 7, 2014, calculating claimant’s benefits using his actual wages as his post-injury wage-earning capacity. 33 U.S.C. §908(h). Except for the correction of a clerical error, the administrative law judge denied employer’s motion for reconsideration.

Employer appeals the administrative law judge’s award of total disability benefits between the date it identified suitable alternate employment and claimant’s obtaining the Walmart job, and between the loss of the Walmart job and the commencement of the Lowes job. In this respect, employer challenges the administrative law judge’s finding that claimant diligently sought suitable work; thus, employer contends the jobs in its labor market survey establish claimant’s wage-earning capacity. Alternatively, employer contends the wages claimant earned in the Walmart job establish his wage-earning

¹ The parties agreed at the hearing that claimant’s employment with Walmart was temporary and he was let go, not for cause, but because his temporary position ended. Tr. at 21; *see* EX 7 at 11, 19.

² At the October 24, 2013 hearing, the parties agreed there was a possibility claimant would find new alternative employment after the hearing but before the decision was issued. The parties agreed to hold the record open for the submission of evidence of new employment. On April 15, 2014, the parties submitted Joint Exhibit 2, which indicated that claimant was hired by Lowes as a customer service assistant on April 7, 2014, for \$9.82 per hour and 30-39 hours per week.

capacity on the open market until he obtained the Lowes job. Claimant responds, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

Where, as here, it is uncontested that claimant cannot return to his usual work because of his work injury, and that employer established the availability of suitable alternate employment, claimant can rebut employer's showing of suitable alternate employment and retain entitlement to total disability benefits if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *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); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The United States Court of Appeals for the Second Circuit, in *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991), 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); *see also Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006).

In this case, employer's October 29, 2012 Labor Market Survey identified six positions: inside sales representative; flow meter repair technician; tool repair technician; customer service representative/dispatcher; unarmed security guard; and toll collector. EX 8C. Dr. Kewalramani approved all of the jobs except for that of tool repair technician, EX 8D, and claimant agreed that employer established the availability of suitable alternate employment with this labor market survey.

In addressing whether claimant diligently pursued alternate employment, the administrative law judge credited claimant's testimony that he applied for all of the jobs in employer's labor market survey except for the toll collector position, which was not available, and that he also applied for positions at Home Depot, Lowes, and Walmart in or around November 2012. Tr. at 71. Claimant also posted his resume on job websites. *Id.* The administrative law judge further found that claimant's having secured jobs with Walmart and Lowes demonstrates that claimant was motivated to return to work. Therefore, given the limited windows between: 1) the establishment of suitable alternate employment on October 29, 2012, and the start of claimant's work for Walmart on February 7, 2013; and 2) the end of his Walmart job on September 26, 2013, and the hearing on October 24, 2013, the administrative law judge found the weight of the evidence showed claimant engaged in a diligent job search. Decision and Order at 13.

Employer challenges the administrative law judge's finding, asserting claimant should have had to do more to establish a diligent job search. Specifically, employer asserts that claimant applied to only eight jobs in the year after employer identified suitable alternate employment, did not follow up on any of the applications he filed, did not contact the vocational rehabilitation counselors in the month between the end of his Walmart job and the formal hearing, did not attempt to find permanent work while working a temporary part-time job at Walmart, and did not register with any employment commission or agency to seek employment. Employer alleges error in the administrative law judge's finding that the period claimant was required to show diligence excludes the time he worked for Walmart. We reject employer's assertions of error and affirm the administrative law judge's award of total disability benefits.

We reject employer's assertion that the administrative law judge erred in finding claimant was diligent in his job search in the period before he obtained the Walmart job. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that it is a claimant's burden to establish reasonable diligence in attempting to secure some type of alternate employment 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. Here, the administrative law judge acknowledged the evidence that detracts from claimant's testimony regarding his job search, but nevertheless found claimant credibly testified that he applied for all of the positions in employer's labor market survey, except for the toll collector position, which was not available when claimant went to apply for it.³ Decision and Order at 6, 12. Moreover, claimant testified he applied through the internet with Lowes, Walmart and Home Depot. The administrative law judge rationally found that claimant's obtaining a job at Walmart is the best evidence of his diligence. Although employer argues that claimant must do more to be "diligent," no case precedent states that a claimant's search *must* go beyond jobs identified by employer.⁴ Rather, the inquiry is a fact-specific one, and the administrative law judge, as the fact-finder, is charged with evaluating the sufficiency of a claimant's job search. *See, e.g., Wilson*, 40 BRBS 46; *Fortier v. Electric*

³ In this regard, the administrative law judge found probative the testimony of Ronnie Ducote, employer's vocational consultant, that he was not disputing claimant's job search, even if some of the prospective employers did not have records of claimant's contact with them. Decision and Order at 12.

⁴ Contrary to employer's assertion, in crediting claimant's testimony that he applied to the exact jobs employer identified, the administrative law judge rationally found claimant searched for jobs within the compass of employment opportunities shown by employer to be suitable and available. *See Turner*, 661 F.2d at 1043, 14 BRBS at 165; *see also Palombo*, 937 F.2d at 74, 25 BRBS at 7(CRT).

Boat Co., 38 BRBS 75 (2004). As the administrative law judge is entitled to determine the credibility of a witness's testimony, *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and as the administrative law judge's finding that claimant was diligent in searching for post-injury employment is supported by substantial evidence of record, we affirm it. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). Consequently, the administrative law judge properly awarded claimant total disability benefits for the period of unemployment from August 1, 2011, until February 6, 2013. *Dollins*, 949 F.2d 185, 25 BRBS 90(CRT).

We next address employer's contentions that the administrative law judge erred in excluding the period claimant worked for Walmart from his diligence analysis, and in awarding claimant total disability benefits between the end of the Walmart job and claimant's obtaining the Lowes job. Employer asserts that when a claimant takes a temporary job, it is incumbent upon him to continue to look for permanent work in order to establish due diligence. Alternatively, employer contends that the Walmart job continued to establish claimant's wage-earning capacity on the open market until he obtained the Lowes job.

We reject these contentions on the facts of this case. The diligence inquiry is relevant to establishing whether a claimant retains entitlement to total disability benefits. *Roger's Terminal & Shipping Corp.*, 784 F.2d 687, 18 BRBS 79(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156. In this case, claimant diligently sought but did not obtain any of the suitable jobs employer identified in its labor market survey, and he obtained a job through his own efforts. Where, as here, a claimant works in unsheltered employment within his restrictions and capabilities, he is partially disabled and not entitled to total disability benefits.⁵ See *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); *Seals v. Ingalls Shipbuilding, Div. of Litton Systems, Inc.*, 8 BRBS 182 (1978). The facts of this case, as found by the administrative law judge, support the award of total disability benefits between the two periods of employment. Claimant sought, but did not obtain, any of the

⁵ We reject employer's assertion that the Walmart job cannot be "suitable alternate employment" on the basis that it was not within the "compass" of employment opportunities demonstrated in employer's labor market survey. Claimant did not allege before the administrative law judge that he was unable to perform his work at Walmart. In this respect, we agree with employer that claimant is improperly raising in his response brief to the Board the contention that he lost the Walmart job due to absences related to medical treatment for the work injury. We decline to address this issue as it was not raised before the administrative law judge, see *Johnston v. Hayward Baker*, 48 BRBS 59 (2014), and we affirm the administrative law judge's implicit finding that the job was suitable while it was available, February 7 to September 26, 2013. See Decision and Order at 13.

suitable jobs employer identified in its labor market survey. Claimant obtained, and then lost through no fault of his own, a job on the open market. While working at Walmart, claimant applied for jobs through Jobs.com. In the brief period following the loss of that job and before the close of the record, the administrative law judge found that claimant diligently sought employment, based on his testimony that he is registered for jobs on Jobs.com and Snagajob.com and checks for job openings online, and through the newspaper, and has applied for jobs through those ads. As the administrative law judge rationally found claimant rebutted employer's labor market survey with a diligent job search, the jobs in the survey cannot establish claimant's wage-earning capacity for any period.

Where, as here, claimant cannot return to his usual work and the only job shown to be suitable ceases to be available through no fault of claimant, employer retains the burden to establish the availability of suitable alternate employment in order to attempt to avoid liability for total disability benefits. In *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994), the United States Court of Appeals for the Ninth Circuit reversed the Board's decision, and deferred to the position of the Director, Office of Workers' Compensation Programs, that a post-injury position held by the claimant for only 11 weeks did not establish his wage-earning capacity because the employer did not "prove that suitable alternate work was 'realistically and regularly available' to [the claimant] on the open market." The Ninth Circuit held that the Director's position "fairly serves the long-term remedial purpose of the LHWCA, an act designed to 'compensate for any injury-related reduction in wage-earning capacity through the claimant's lifetime.'"⁶ *Id.*, 999 F.2d at 1376, 27 BRBS at 83(CRT) (quoting *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 799, 16 BRBS 56, 62(CRT) (D.C. Cir. 1984)) (emphasis in *Edwards*); see also *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 1222 n.4, 43 BRBS 21, 23 n.4(CRT) (11th Cir. 2009) (in a modification context, employer is liable for greater award when claimant's post-injury employer reduced his wages, and employer did not offer evidence of higher paying suitable alternate employment); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981); *c.f. Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996) (where

⁶ Similarly, where employer provides claimant with suitable alternate employment at its own facility and the position becomes unavailable for reasons unrelated to claimant's misconduct, employer bears the renewed burden of establishing suitable alternate employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009).

claimant is discharged for misconduct, he is not entitled to total disability benefits, but retains any partial disability award to which he was entitled). In light of this stated purpose of the Act, the length of time claimant held the Walmart job is not determinative of his entitlement to total disability benefits upon losing that job. *Del Monte*, 563 F.3d at 1222, 43 BRBS at 23(CRT); *Randall*, 725 F.2d at 799, 16 BRBS at 62(CRT). Therefore, as there is no evidence that the Walmart job or any other suitable job was available during the period of claimant's unemployment, employer failed to establish that claimant had a wage-earning capacity on the open market during this period. The administrative law judge's award of total disability benefits for this period accords with law and therefore is affirmed.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge