

BRB No. 99-1228

JAMES B. THOMPSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>08/31/2000</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1164, 1165) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 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).

Claimant, a pipefitter in employer's X-42 department, suffered from work-related carpal tunnel syndrome, for which employer voluntarily paid claimant temporary total disability benefits for various periods and a 25 percent scheduled permanent partial disability award for each upper extremity. Claimant returned to work for employer in a light-duty capacity. Claimant also suffers from thoracic outlet syndrome. He sought temporary total and partial disability benefits during the period of his layoff from his light duty job from

November 17, 1995, through August 11, 1997, when he returned to his usual work with employer. During the period of the layoff, claimant worked for 11 different employers; eight of the jobs involved pipefitting work.

The administrative law judge denied claimant additional disability benefits, finding that his thoracic outlet syndrome was not the result of the natural progression of his work-related carpal tunnel syndrome. Moreover, the administrative law judge declined to address whether claimant's thoracic outlet syndrome was due to the aggravation of his work-related carpal tunnel syndrome or constituted a separate work injury as the administrative law judge found that claimant did not raise these theories of recovery. The administrative law judge also found that claimant did not establish his *prima facie* case of total disability and thus denied claimant the benefits he sought for the layoff period.¹

On appeal, claimant contends that the administrative law judge erred in finding that his thoracic outlet syndrome is not work-related, and that he is not entitled to temporary total and partial disability benefits during the period of his layoff from employer's light duty job from November 17, 1995, through August 11, 1997. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge erred in finding that his thoracic outlet syndrome is not work-related, specifically, that contrary to claimant's contention, his thoracic outlet syndrome was not a natural consequence of his carpal tunnel syndrome. Employer is liable for any disability due to claimant's work-related injury and its natural progression. *See Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). In the instant case, the administrative law judge found that claimant's thoracic outlet syndrome is not the result of the natural progression of his work-related carpal tunnel syndrome based on Dr. McArthur's opinion that claimant's restrictions for his thoracic outlet syndrome are not related to his work-related carpal tunnel syndrome but instead to cumulative trauma that came to light in 1989-1990 and which resulted in a different medical condition. We thus affirm the administrative law judge's finding that claimant's claim for his thoracic outlet syndrome is not due to the natural progression of his work-related carpal tunnel syndrome as it is supported by substantial evidence. Decision and Order at 6-7; Emp. Ex. 35 at 2.

¹The administrative law judge alternatively found, assuming, *arguendo*, that claimant was entitled to compensation, the most he could receive was temporary partial disability benefits as claimant was working during most of the layoff period.

Moreover, we affirm the administrative law judge's finding that this theory of recovery was the only one raised by claimant as it is supported by the evidence, and thus we affirm the administrative law judge's conclusion that he need not address, in the present proceeding, whether claimant's thoracic outlet syndrome is due to the aggravation of his carpal tunnel syndrome or whether claimant's thoracic outlet syndrome is a separate and distinct work-related injury. The Supreme Court has held that Section 20(a) of the Act does not require the administrative law judge to address and employer to rebut every conceivable theory of recovery. *See U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Rather, the administrative law judge is required to address only the claims made. *Id.* As the administrative law judge rationally found, based on the pleadings before him, that claimant raised only the single theory of recovery, we affirm the administrative law judge's finding that claimant's thoracic outlet syndrome is not compensable in this proceeding.² *Id.*; Decision and Order at 7-8.

Claimant also contends that the administrative law judge erred in finding that he did not establish his *prima facie* case of total disability and thus erred in denying him disability benefits during his layoff with employer. Claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). Employer may meet this burden by offering claimant a light duty position in its facility. *See*

²In light of our holding, that a claim for thoracic outlet syndrome as a separate injury related to claimant's working conditions was not properly raised, we need not address the administrative law judge's alternative findings regarding the application of the Section 20(a) presumption to the thoracic outlet syndrome, *see* Decision and Order at 7 n. 11, except to note that his reasoning for finding that Section 20(a) would not be invoked is not in accordance with law. *See, e.g., Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). Where claimant is laid off from a suitable post-injury light duty job within employer's control for reasons unrelated to any actions on his part, and demonstrates that he remains physically unable to perform his pre-injury job, the burden remains with employer to show the availability of new suitable alternate employment, if employer wishes to avoid liability for total disability. See *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

With regard to claimant's work-related carpal tunnel syndrome, the administrative law judge found that claimant did not establish his *prima facie* case of total disability during the period of the layoff as eight of his eleven post-layoff jobs were similar to his pre-injury job with employer. As claimant was restricted from using air impact tools due to his carpal tunnel syndrome at the time of the layoff from his light duty job, and as none of the post-layoff employers required claimant to use these tools in the performance of his work with them, we reverse the administrative law judge's finding that claimant did not establish his *prima facie* case of total disability; as these jobs did not require the same work as his pre-injury employment, they cannot establish that claimant could perform his pre-injury work.³ See generally *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); Decision and Order at 10; Tr. at 30-31, 36, 38, 39, 97-98, 123-124, 126-129. The fact that some of the jobs were similar to claimant's pre-injury job is insufficient; claimant has established his *prima facie* case in view of his inability to work with air-impact tools, as required by his pre-injury job. The burden thus shifted to employer to demonstrate the availability of suitable alternate employment during the period of the layoff in order to avoid liability for total disability benefits. *Hord*, 193 F.3d at 797, 33 BRBS at 170(CRT).

The administrative law judge alternatively commented on claimant's entitlement to disability compensation for the period of the layoff, stating in a footnote that claimant would not be able to receive more than temporary partial disability benefits since claimant was working during most of the layoff period and as total disability benefits generally cannot be awarded to a working claimant. Decision and Order at 11 n. 15. In light of the recent decision of the United States Court of Appeals for the Fourth Circuit in *Hord*, 193 F.3d at 797, 33 BRBS at 170(CRT), we must vacate this finding and remand the case to the

³The administrative law judge's reliance on the holdings in the unpublished cases of *Forgich v. Norfolk Shipbuilding & Dry Dock Corp.*, 153 F.3d 719, No. 96-2574 (4th Cir. Aug. 4, 1998)(Table) and *Newport News Shipbuilding & Dry Dock v. Cole*, 120 F.3d 262, No. 96-2535 (4th Cir. Aug. 12, 1997)(Table), is misplaced now in light of the Fourth Circuit's recently published decision in *Hord*.

administrative law judge for further consideration. In *Hord*, the court held that a claimant who is unable to return to his usual work and who is laid off from a light duty job at his employer's facility is entitled to total disability benefits in the absence of evidence of other suitable alternate employment. *But see Mendez*, 21 BRBS at 22. On remand, therefore, the administrative law judge must consider claimant's entitlement to benefits in light of *Hord*. In this regard, the administrative law judge must determine if any of the post-injury jobs constituted suitable alternate employment. *See Hord*, 193 F.3d at 797, 33 BRBS at 170 (CRT).

Moreover, although claimant made a claim for temporary total and temporary partial disability benefits, the administrative law judge should consider whether the claim is properly one for permanent disability benefits in light of Dr. McArthur's rating of claimant's impairments in 1993, Emp. Ex. 36, and employer's payment of disability benefits pursuant to the schedule at Section 8(c)(1), 33 U.S.C. §908(c)(1). *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999). If claimant's condition is permanent, he may not receive permanent partial disability benefits for his carpal tunnel syndrome during the post-layoff periods when he was working based on a loss in wage-earning capacity, *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), nor may he receive additional temporary disability benefits absent a change in his condition, such as requiring additional surgery.

Accordingly, the administrative law judge's denial of benefits for claimant's work-related carpal tunnel syndrome during the period of his layoff from his light duty job at employer's facility is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge