BRB No. 00-0320

SHEILA L. GOODWIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Dec. 5, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	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.

Christopher R. Hedrick and Lexine D. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-0498, 99-LHC-0680) 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 administrative law judge's 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 was hired by employer on May 9, 1988, as an electrician. She developed carpal tunnel syndrome in her right hand in 1995, and employer paid temporary total and permanent partial disability benefits for this injury. Emp. Ex. 1. Claimant developed similar problems in her left hand in 1997. Employer did not pay benefits for this condition. Claimant was laid off, as part of a general economic lay-off, on June 15, 1998. Tr. at 45; Emp. Ex. 6b. Claimant had been working with permanent restrictions imposed

by Dr. Felder and was on these restrictions at the time the layoff occurred. During this time she collected unemployment compensation under Virginia law. She allegedly turned down several jobs which paid less than she was receiving in unemployment compensation, but found several positions through her own efforts. She was recalled to work by employer on February 21, 1999. Claimant sought disability benefits from June 16, 1998, the day after she was laid off, until February 21, 1999, the date she went back to work. Tr. at 16-17.

In his decision, the administrative law judge found that claimant's left hand condition was a result of the work-related aggravation of her pre-existing ganglion cyst, and is therefore causally related to claimant's work. The administrative law judge also found that this condition rendered claimant unable to perform her work with employer. *See* n. 1, *supra*. The administrative law judge thus awarded claimant temporary partial disability benefits from June 18, 1998, through February 21, 1999, based on the parties' stipulation that suitable alternate employment existed during this time period. In a footnote, the administrative law judge found that claimant's post-injury wage-earning capacity was $206 per week.

On appeal, employer contends that the administrative law judge erred in awarding claimant benefits during the layoff period, as claimant's layoff was purely for economic reasons. Employer also challenges the administrative law judge's post-injury wage-earning capacity determination, alleging that it should be higher than the minimum wage. Claimant responds, urging affirmance of the administrative law judge's findings.

Employer first contends that the job in employer's facility constituted suitable alternate employment because it was within claimant's restrictions and the layoff was due to economic considerations, rather than to claimant's work-related injury. Employer therefore argues that the administrative law judge erred in awarding claimant disability benefits during her layoff. We disagree. Claimant establishes her *prima facie* case of total disability if she is unable to perform her usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where claimant establishes her *prima facie* case, 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 suitable position in its facility. *See Darby v. Ingalls*

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[1]Claimant was restricted from using her right hand in certain activities, and thus performed elements of her usual work with her left hand.

[2]The administrative law judge's finding that claimant did not diligently seek employment, precluding an award of total disability benefits, is not challenged on appeal.

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 her part, and demonstrates that she remains physically unable to perform her pre-injury job, the burden remains with employer to show the availability of other suitable alternate employment, if employer wishes to avoid liability for total disability. *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). As the restricted job in employer's facility, even if suitable, was unavailable to claimant during the economic layoff, pursuant to *Hord*, the job in employer's facility cannot constitute suitable alternate employment. As employer does not contest the administrative law judge's finding that claimant could not return to her usual employment, the administrative law judge properly shifted the burden to employer to demonstrate the availability of suitable alternate employment during the period of the layoff. *Hord*, 193 F.3d at 797, 33 BRBS at 170(CRT).

The administrative law judge found that employer established the availability of suitable alternate employment on the open market, based on the parties' stipulation to that effect. Employer, however, challenges the administrative law judge's determination of claimant's post-injury wage-earning capacity based on the minimum wage of $5.15 per hour. Employer argues that positions listed in a labor market survey dated May 5, 1997, prepared by Mr. Karmolinski, a vocational consultant, paid more than minimum wage, that a position claimant obtained during a strike in which she was involved subsequent to being recalled, Tr. at 50, paid $6 per hour, and that jobs identified by Mr. Koah, another rehabilitation counselor, paid well above minimum wage. Employer asserts that the correct interpretation of the stipulation to which the parties agreed is that jobs paying at least minimum wage were available, but that consideration of evidence identifying positions at higher than minimum wage was not precluded.

We agree with employer that in the context within which the disputed stipulation was reached, the administrative law judge's determination of claimant's wage-earning capacity cannot be affirmed. The parties stipulated that there was a range of jobs

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[3]The 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 superseded by the Fourth Circuit's published decision in *Hord*.

[4]Employer attempts to distinguish *Hord* on the basis that in that case, employer did not establish suitable alternate employment on the open market. This fact does not alter *Hord's* holding that a light duty job in employer's facility does not constitute suitable alternate employment if it is unavailable during an economic layoff.

available during the period in question at minimum wage, or $5.15 per hour, comparable to the cashier position at Bon Air Cleaners, listed in Mr. Karmolinski's labor market survey. Emp. Ex. 8-J. Tr. at 121-124. Claimant argues in response that employer "withdrew" Mr. Karmolinski's report and did not have him testify, and that therefore the remainder of Mr. Karmolinski's report, identifying jobs at higher than minimum wage, is to be ignored. Although it is true that employer did not call Mr. Karmolinski to testify following the parties' stipulation at the hearing, his report remained in the record. *See* Emp. Ex. 8. Claimant thus argues that the parties stipulated that claimant's wage-earning capacity was "only" minimum wage. *See* Tr. at 121-124. When asked by the administrative law judge "[A]re you willing to stipulate that she did not have a higher wage-earning capacity during this time? Not that you have to,. . ." Tr. at 122, employer's counsel answered "I don't know that I can do that, based on the evidence. . . . I think Mr. Koah's testimony might establish that she had a higher wage-earning capacity." *Id.* Claimant argues that Mr. Koah, a rehabilitation counselor hired by the Department of Labor, deposed that there were jobs available to claimant in the $6.50 to $7.50 range, but he does not identify them with any specificity. Emp. Ex. 13 at 17-18.

The intention of the parties during the exchange surrounding the stipulation in question is thus ambiguous. In his decision, the administrative law judge did not refer to this exchange and did not discuss claimant's wage-earning capacity in any detail. He awarded temporary partial disability benefits, explaining in a footnote that he obtained the figure based on the stipulated minimum wage. Although the administrative law judge is entitled to draw his own inferences from the evidence, *see John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961), in this instance, since it is not clear whether both parties intended to stipulate that claimant's wage-earning capacity equals minimum wage, and the administrative law judge did not explain his interpretation of the parties' stipulation in arriving at the post-injury wage-earning capacity figure, the case is remanded for him to reconsider the issue of claimant's wage-earning capacity during the period of the layoff.

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[5]The circumstances surrounding this stipulation, reached at the hearing, are that employer's counsel stated that he was prepared to call Mr. Karmolinski, a vocational consultant, to testify, but upon claimant's counsel's stipulation that claimant retained a minimum wage-earning capacity during the period at issue, agreed not call him. Tr. at 121.

[6]Mr. Koah apparently provided job leads to claimant by telephone. Emp. Ex. 13 at 8-9. He specifically refers to a job claimant was actually offered as a dietician's aide at $5.60 per hour, but which she declined. *Id.* at 9.

[7]The administrative law judge lists the stipulation at issue as "That suitable alternate employment existed during the period between June 15, 1998, and February 22, 1998 as evidenced by EX 8-J." *See* Decision and Order at 9; Tr. at 12-16,121. The parties did not submit written stipulations prior to the hearing.

Accordingly, the administrative law judge's award of partial disability benefits based on a minimum wage wage-earning capacity 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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge