BRB No. 03-0399

MARK T. ZEPHIR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Feb. 26, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1890, 2001-LHC-0426) of Administrative Law Judge Daniel A. Sarno, Jr., denying benefits 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 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, a machinist, began his employment with employer in 1983. Claimant alleged he sustained an injury to his right shoulder and neck when he slipped and fell on a wet stairway on August 20, 1999, during an emergency evacuation of a ship. Claimant was discharged from employer on November 15, 1999, but reinstated on January 17,

2000, in settlement of the grievance he filed through his union. Claimant returned to light duty employment on January 18, 2000. He had surgery on his shoulder in February 2000. Claimant alleged entitlement to various periods of temporary total disability benefits, including continuing benefits from September 30, 2001. The administrative law judge accepted the parties' stipulation that no work was available at employer's facility within claimant's medical restrictions for the period between November 12, 1999 and January 16, 2000, and continuing from September 29, 2001.

In his Decision and Order, the administrative law judge noted the parties' agreement that claimant is unable to perform his usual work due to his injury. Thus, claimant established his *prima* facie case of total disability. The administrative law judge found that employer established the availability of suitable alternate employment on the open market, based on a sales position claimant obtained at Dixie RV Sales Superstore (Dixie) selling new and used recreational vehicles, from June 2000 to September 29, 2001. The administrative law judge found that this position was "well within claimant's educational, vocational, physical, and skill levels," and because claimant earned higher wages in his post-injury job with Dixie than he had in his pre-injury job with employer, the administrative law judge found that claimant had no loss of wage-earning capacity. Decision and Order at 9-10. The administrative law judge also found that because claimant was laid off from the Dixie sales position on September 29, 2001, for economic reasons unrelated to his injury, and claimant actually worked successfully at this job for several months, employer was not required to identify new suitable alternate employment for claimant. Therefore, the administrative law judge determined that he need not address employer's proffer of additional jobs identified as suitable alternate employment, or claimant's diligence in seeking jobs elsewhere.

On appeal, claimant alleges that the administrative law judge erred in finding that the job with Dixie satisfied employer's burden of establishing suitable alternate employment after claimant was laid off from this job on September 29, 2001. Claimant thus contends he is entitled to total disability benefits commencing September 30, 2001. Claimant also contends the administrative law judge failed to address his entitlement to medical benefits for his neck, which claimant alleged he injured in the 1999 accident. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Once, as here, claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which the claimant by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Trans State-Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT)(4th Cir. 1984). In

the instant case, employer has conceded that it had no light duty work available in its facility for claimant within his medical restrictions. Thus, employer must establish the availability of suitable alternate employment on the open market in order to meet its evidentiary burden. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

We must remand this case for reconsideration, as the administrative law judge did not analyze the issue with regard to the proper case law. The administrative law judge found that claimant obtained on the open market and actually worked successfully at a post-injury job from which he was laid off for reasons unrelated to his injury. Pursuant to the Board's decision in *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), the administrative law judge therefore found that employer did not bear a renewed burden of establishing the availability of alternate employment on the open market. In *Edwards*, the Board held that as the claimant held a suitable alternate position for 11 weeks and was laid off from that position for reasons unrelated to his injury, the employer did not bear the renewed burden of establishing suitable alternate employment and the claimant was not entitled to total disability benefits after the layoff.

The Board's decision in *Edwards*, however, was reversed on appeal to the United States Court of Appeals for the Ninth Circuit. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). The court held that the claimant's short-lived employment did not establish that suitable alternate employment was "realistically and regularly" available on the open market, deferring to the Director's position that Section 8(h) of the Act, 33 U.S.C. §908(h), requires that post-injury earnings be sufficiently regular in order to constitute the claimant's wage-earning capacity. *Id.*, 999 F.2d at 1375-1376, 27 BRBS at 83(CRT). The Ninth Circuit expressed its opinion that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the present cases arises, agreed with this interpretation. The *Edwards* court quoted *Lentz*, 852 F.2d at 131, 21 BRBS at 112(CRT): "By proving that the injured employee retains the capacity to earn wages in *regular, continuous* employment, the employer's compensation liability is reduced or eliminated." *Edwards*, 999 F.2d at 1376 n.1, 27 BRBS at 83 n.1(CRT) (emphasis in *Edwards*). Moreover, in the context of modification pursuant to Section 22 of the Act, 33 U.S.C. §922, the Board has held that a claimant who is laid off from a suitable alternate job for economic reasons is entitled to have his permanent partial disability award modified to permanent total disability if employer does not demonstrate the availability of other suitable alternate employment. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995) (change in economic condition may be basis for modification); *Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (employer bears renewed burden of establishing suitable alternate

employment when claimant is laid off from a suitable job at employer's facility); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In this case, claimant was employed by Dixie from June 2000 to September 2001. On remand, consistent with applicable law, the administrative law judge should reconsider whether this position established that claimant's post-injury wages were sufficiently regular such that employer established that suitable alternate employment was realistically and regularly available to claimant on the open market. *Edwards*, 999 F.2d at 1375, 27 BRBS at 83(CRT). In this regard, the administrative law judge should reconsider the periods during which claimant did not receive a paycheck, although he remained employed by Dixie. Decision and Order at 10 n.10. If the administrative law judge finds that the Dixie job is insufficient to establish that suitable alternate employment was realistically and regularly available on the open market, the administrative law judge should review employer's other evidence of suitable alternate employment, which consists of the hearing testimony of William Kay, a vocational rehabilitation counselor. Mr. Kay testified as to the availability and suitability of vehicular sales positions. Tr. at 75 *et seq.* *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). If employer meets its burden of establishing suitable alternate employer, claimant nonetheless may establish entitlement to total disability by showing that he sought alternate employment, but was unable to secure it. *Palumbo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger's Terminal & Shipbuilding Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). In this regard, claimant testified in a post-hearing deposition that he was unable to obtain other employment in the vehicular sales area.[1] *See* Cl.'s post-hearing deposition.

Claimant also contends that the administrative law judge did not address his entitlement to medical benefits for an alleged neck injury sustained in the August 20, 1999 work accident. At the hearing, claimant alleged he sustained a harm to his neck in the work accident, and employer was unwilling to stipulate to this fact. Tr. at 6. Although claimant did not allege entitlement to any specific disability or medical benefits for the neck injury, *see generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), on remand the administrative law judge

[1] The administrative law judge also should address claimant's contention that he is entitled to total disability benefits during the period following his layoff from Dixie during which he returned to college to complete a two-year degree in criminal justice. *See Abbot v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

should clarify the parties' positions on this issue and address the cause of claimant's neck condition, consistent with Section 20(a), 33 U.S.C. §920(a), if necessary.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr
Administrative Appeals Judge