BRB Nos. 88-4065
and 90-2118

ARTHUR JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:_____
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor and the Compensation Order-Award of Compensation of N. Sandra Kitchin, District Director, United States Department of Labor.

Bobby G. O'Barr, Biloxi, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

BEFORE: STAGE, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (85-LHC-1618 and 85-LHC-1619) of Administrative Law Judge Parlen L. McKenna and the Compensation Order-Award of Compensation of District Director N. Sandra Kitchin (6-92782) rendered on claims 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 trier-of-fact 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 welder for employer, sustained numerous work-related back and shoulder injuries while working for employer from 1971 to 1987. The injuries involved in the current appeal occurred on September 6, 1983, February 4, 1985, and January 24, 1986. Claimant received conservative treatment for these injuries

by orthopedic surgeon, Dr. John Semon. On November 14, 1986, Dr. Semon released claimant to return to work following the January 24, 1986, work injury. Although claimant attempted to return to work on December 1, 1986, he found that his former welding work was too strenuous, and testified that employer had not attempted to place him in a lighter position. Dr. Semon prescribed medication and recommended that claimant attempt to continue working.

After several unsuccessful attempts to return to work, claimant returned to Dr. Semon in February 1987, complaining that his former work was too strenuous and that employer had not placed him in a light duty position. On February 6, 1987, Dr. Semon gave claimant a 10 percent permanent impairment rating of the back. On February 19, 1987, Dr. Semon determined that claimant had reached maximum medical improvement, and recommended that he make no further efforts to return to his job with employer. Thereafter, claimant underwent vocational retraining at employer's expense.

After graduating from a security guard school in September 1987, claimant obtained several security guard positions and performed this work until January 1988, when he returned to Dr. Semon complaining of lower back and leg pain. Claimant has not worked since that time. Claimant sought compensation under the Act for the September 6, 1983, February 4, 1985, and January 24, 1986, work-related injuries. The administrative law judge awarded claimant temporary total disability compensation from September 8, 1983 to December 2, 1984, from February 5, 1985 through March 24, 1985, and from January 27, 1986 through February 18, 1987, and permanent total disability benefits commencing thereafter. In addition, the administrative law judge awarded claimant medical benefits. Finally, the administrative law judge remanded the case to the district director for consideration of employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), finding that this issue was not ripe for adjudication at the time of the formal hearing.[1] On April 3, 1990, District Director[2] N. Sandra Kitchin issued a Compensation Order in which she calculated the award of benefits in accordance with the administrative law judge's Decision and Order. She also determined that employer was entitled to Section 8(f) relief,

[1]In a Decision and Order on Motion for Reconsideration dated January 30, 1989, the administrative law judge modified the $335 average weekly wage determination made in the initial Decision and Order in accordance with the parties' stipulation that the applicable average weekly wage was $368.68. On June 5, 1989, the administrative law judge issued a Supplemental Decision and Order Awarding Attorney's Fees to claimant's counsel.

[2]The term "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

finding that claimant's pre-existing back injuries and insulin-dependent diabetes were contributing factors in his permanent total disability.

On appeal, employer challenges the award of permanent total disability compensation, arguing that the administrative law judge erred in failing to find that it met its burden of establishing the availability of suitable alternate employment based on claimant's actual post-injury work as a security guard. In the alternative, employer argues that because claimant's treating physician anticipated that he would soon return to the same condition that he had been as of February 19, 1987, the date of maximum medical improvement, and would be able to return to security guard work, claimant is at most entitled to a short period of temporary total disability. As a second alternative, employer argues that any disability compensation awarded after claimant's last day of work in January 1988 should be considered temporary disability, and that the case should be remanded for the administrative law judge to determine when claimant recovered from the temporary worsening of his condition, and what, if any, permanent disability existed thereafter. Employer also has filed an appeal which challenges the district director's Compensation Order[3] to the extent that it incorporates the administrative law judge's finding that claimant is permanently totally disabled. BRB No. 90-2118. Claimant responds, urging affirmance.

In order to establish a prima facie case of total disability, claimant must show that he cannot return to his usual employment due to a work-related injury. See Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 145-46 (1991). In this case, as it is undisputed that claimant could not return to his usual work, the administrative law judge properly determined that the burden shifted to employer to establish the availability of suitable alternate employment. See Edwards v. Todd Shipyards Corp., 25 BRBS 49, 51 (1991), appeal pending No. 91-70648 (9th Cir., October 24, 1991). In order to meet this burden, employer must show the existence of realistically available job opportunities within the geographic area where claimant resides which he is capable of performing by virtue of his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Avondale Shipyards v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Citing Walker v. Sun Shipbuilding and Dry Dock Co., 12 BRBS

[3]By an Order dated February 5, 1992, employer's appeal of the administrative law judge's Decision and Order, BRB No. 88-4065, was consolidated for purpose of decision with employer's appeal of the district director's Compensation Order, BRB No. 90-2118.

133 (1980) (Miller, J., dissenting), vac. and remanded mem. on other grounds, 642 F.2d 445 (3rd Cir. 1981), decision on remand, 19 BRBS 171 (1986), and Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980), employer contends that it established the availability of suitable alternate employment because claimant performed actual post-injury work as a security guard for several employers, and left at least two of these positions for reasons unrelated to his work injuries. After his graduation from a nine week security guard training program on September 4, 1987, claimant was hired by Kirkland Security Company as a security guard. Claimant worked for Kirkland Security Company for only three days, leaving that job upon learning that he would not be receiving a pay check for two months. Claimant testified, however, that he felt that some of the duties this job entailed, such as opening a 50 pound gate, were outside his physical restrictions. On September 18, 1987, claimant obtained employment with the Pinkerton Security Company at the International Paper Company, where he worked until November 20, 1987, when he was attacked by a disgruntled employee. Claimant remained off work and was paid workmen's compensation by Pinkerton from November 20, 1987, until December 13, 1987, when he returned to work for Pinkerton. After working a day or two during the Christmas holidays for Pinkerton at Mobile Infirmary, claimant returned to work at the International Paper Company. After the Christmas holidays, claimant began working for Pinkerton at a rehabilitation center because Pinkerton had lost its contract with the International Paper Company. Claimant testified that the work he performed at the rehabilitation center involved more walking than the other security jobs he had performed and that this work aggravated his back. Claimant also testified that had Pinkerton not lost its contract with International Paper Company, he could have continued to work there as most of the job he did was sitting down.

Although the administrative law judge in this case found that claimant's post-injury security guard jobs did not constitute suitable alternate employment, we agree with employer that he failed to fully analyze this issue. The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises, has held that in order to satisfy its burden of proving suitable alternate employment, an employer need not show the availability of more than one specific job, and that a showing of general availability of work in the local community within claimant's capabilities will suffice. See P & M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991). In this case, the administrative law judge determined that claimant's post-injury security guard work did not constitute suitable alternate employment because claimant's job often required prolonged walking and standing which eventually rendered him incapable of performing the work. After noting claimant's testimony that he felt he could work as a security guard if he

could sit much of the time, the administrative law judge determined that there was no evidence that such a job was available. In so concluding, however, the administrative law judge did not consider that employers have been found to establish the availability of suitable alternate employment where claimant performs post-injury work which is suitable and is unable to continue in that employment for reasons unrelated to the work injury. See Edwards, 25 BRBS at 49. Employer is not a long-term guarantor of a claimant's employment. Id., 25 BRBS at 52.

Because the administrative law judge did not consider the individual requirements of each of claimant's post-injury security jobs and did not consider his testimony which suggests that some of these jobs may have been suitable, we vacate his finding that employer has failed to establish suitable alternate employment and remand for reconsideration of this issue. On remand, the administrative law judge should consider the specific requirements of each of claimant's post-injury jobs to determine whether the work was suitable. If any of the post-injury jobs are found to be suitable, the administrative law judge should then consider claimant's reason for leaving that employment. If he determines that claimant left a suitable job for reasons unrelated to his work injuries and that therefore suitable alternate employment was established, he should then consider whether claimant suffered a loss of wage-earning capacity sufficient to support an award of permanent partial disability compensation. See 33 U.S.C. §§908(c)(21), 908(h).

Employer's alternative arguments that claimant should be limited to temporary disability compensation are rejected. As the administrative law judge rationally found that claimant reached maximum medical improvement from his January 24, 1986 work injury as of February 19, 1987, based on Dr. Semon's opinion, the administrative law judge properly characterized the nature of claimant's disability thereafter as permanent. See generally Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), rev'g Stevens v. Lockheed Shipbuilding Co., 22 BRBS 280 (1989), cert. denied, 111 S.Ct. 798 (1991).

We need not address employer's appeal of the district director's compensation order awarding Section 8(f) relief and calculating the benefits due based on the administrative law judge's finding of permanent total disability, BRB No. 90-2118, except to note that such an appeal is unnecessary. In any case where a party prevails on appeal and the award of benefits is altered, the district director must recalculate the benefits due from employer and the Special Fund. The act of calculating benefits due is a ministerial act performed by the district director after issuance of an award. If the administrative law judge on remand enters a new award which alters the compensation due claimant, the district director must recalculate the award.

Accordingly, the administrative law judge's award of permanent total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge