

BRB No. 91-1992

LEON HAMILTON )

Claimant-Petitioner )

v. )

NEWPORT NEWS SHIPBUILDING )  
AND DRY DOCK COMPANY )

Self-Insured )  
Employer-Respondent )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

Party-in-Interest )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand-Award of Benefits of Aaron Silverman,  
Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-  
insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Award of Benefits (87-LHC-1115) of  
Administrative Law Judge Aaron Silverman 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 of the administrative law judge  
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).

This is the second time that this case has been before the Board. Claimant suffered the last

of three work-related back injuries on July 18, 1984, while at work as a machinist for employer, and he underwent a hemilaminectomy on August 15, 1984. He returned to light-duty work with employer on August 19, 1985, but in February 1986, claimant was "passed out" of employer's facility because no work was available within his restrictions. Thereafter, on March 21, 1986, claimant underwent surgery for removal of residual fragments in the lumbar area, and he has not worked since that time. Employer paid claimant temporary total disability benefits for various periods until March 4, 1987, and permanent partial disability benefits from March 5, 1987 and continuing. At the time of his injury, claimant's average weekly wage was \$445.79. Claimant filed a claim for permanent total disability benefits.

In his initial Decision and Order, the administrative law judge found that claimant is unable to perform his usual employment, and that claimant reached maximum medical improvement on July 24, 1986. Next, the administrative law judge found that the jobs identified by employer, including that of security guard, were approved by Dr. Peach as within claimant's physical capacity and that claimant's continued unemployment is due to lack of diligence on his part. Finally, the administrative law judge found that claimant has a post-injury wage-earning capacity based upon the wages for the security guard position. Thus, the administrative law judge awarded claimant permanent partial disability compensation of \$201.19 per week, stating that this represented the difference between claimant's pre-injury wages and those that claimant could have earned as a security guard. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant appealed the denial of his claim for permanent total disability benefits to the Board. *Hamilton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 88-2375 (June 29, 1990) (unpublished). The Board remanded the case to the administrative law judge for further findings on the availability of suitable alternate employment and declined to address claimant's objections to the administrative law judge's due diligence findings until employer has established the availability of suitable alternate employment.

Specifically, the Board held that the administrative law judge failed to adequately discuss whether the security guard job at Lipscomb Security Agency constitutes suitable alternate employment. The Board noted that regardless of whether the job was offered to claimant, employer has not met its burden of proving suitable alternate employment unless it shows that claimant's criminal conviction would not impede his ability to obtain this position. The Board further noted that the administrative law judge failed to specifically address whether claimant is able to obtain any of the other security guard positions identified by employer given his criminal conviction, or whether any of the other jobs identified by employer, such as public information clerk, toll collector, traffic technician, cashier, and facility attendant, constitute suitable alternate employment given claimant's restrictions. Finally, inasmuch as there was conflicting evidence as to the hourly rate for the Lipscomb security guard position, and the administrative law judge failed to explain his determination regarding claimant's post-injury wage-earning capacity, on remand, the Board instructed the administrative law judge to reconsider claimant's post-injury wage-earning capacity and fully explain his findings.

In his Decision and Order on Remand, the administrative law judge found, without discussing any of the security guard positions, that employer established the availability of suitable alternate employment based on the existence of five jobs and specifically the position of Public Information Clerk for the City of Virginia Beach. The administrative law judge thus awarded claimant permanent partial disability benefits based on the wages of the information clerk position, which resulted in a lesser award of permanent partial disability.

On appeal, claimant contends that the administrative law judge failed to follow the Board's remand instructions, and did not address all of the evidence relating to suitable alternate employment. Employer responds, arguing that the administrative law judge's Decision is supported by substantial evidence and should be affirmed.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1032, 14 BRBS 156 (5th Cir. 1981). A showing by employer of a single job opening is insufficient to satisfy employer's burden of suitable alternate employment. Employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

Claimant's contentions have merit. On remand, the administrative law judge did not discuss claimant's ability to obtain any of the security guard jobs.<sup>1</sup> He summarily stated that employer established the availability of suitable alternate employment by identifying five jobs that are within claimant's physical restrictions as set by Dr. Peach and that are appropriate given claimant's vocational and educational background. The administrative law judge specifically mentioned the job as a Public Information Clerk for the City of Virginia Beach as being available to claimant, and he used the wages of this position to set claimant's post-injury wage-earning capacity.

As the administrative law judge properly found, some of the jobs identified are within claimant's physical restrictions, inasmuch as Dr. Peach found them appropriate for claimant.<sup>2</sup> *See generally Sketoe v. Dolphin Titan International*, BRBS , BRB Nos. 93-817/A (Sept. 15, 1994) (Smith, J., dissenting on other grounds). Nonetheless, the administrative law judge did not discuss

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<sup>1</sup>The administrative law judge stated only that claimant's criminal conviction may have caused a problem in obtaining these jobs, and he noted that claimant made no attempt to resolve his inability to obtain employment requiring registration with the state.

<sup>2</sup>These positions include a cashier for Papco, a facility attendant at a recreation center, public information clerk for Virginia Beach, toll collector, traffic technician, and security guard. Emp. Exs. 21, 25.

the deposition testimony of the opposing vocational rehabilitation counselors regarding whether these jobs are realistically available to claimant. Kenneth Vaughn, testifying on behalf of claimant, stated that he did not believe that the information clerk or toll collector positions were realistically available to claimant. Dep. at Ex. 2. Marc Cooper, employer's vocational counselor, testified as to when the jobs in question were actually available and that claimant could have realistically competed for these positions. Emp. Ex. 22. In *Lentz*, 852 F.2d at 131, 21 BRBS at 112 (CRT), the Fourth Circuit stated that it is employer's burden to identify a range of jobs that is reasonably available and which the claimant can realistically secure. As the administrative law judge did not address this issue, we, therefore, must vacate the administrative law judge's finding that employer established the availability of suitable alternate employment. On remand, the administrative law judge must consider whether employer has met its burden under the standard set forth in *Lentz*, discussing all relevant evidence and setting forth with specificity the evidence he relies upon.<sup>3</sup> See generally *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). If the administrative law judge relies on the security guard positions, he must discuss the availability of the jobs in light of claimant's criminal conviction, as stated in the Board's first decision. See *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). If suitable alternate employment is established, then the administrative law judge must consider if claimant is nonetheless entitled to total disability benefits because he "diligently sought appropriate employment" but was unable to secure it. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542, 21 BRBS 10, 13 (CRT)(4th Cir. 1988).

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<sup>3</sup>The administrative law judge also must reconsider his finding regarding claimant's post-injury wage-earning capacity consistent with his findings on suitable alternate employment.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge