BRB No. 92-1547

RENE M. DARBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Additional Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Blewett W. Thomas, Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Additional Benefits (91-LHC-49) of Administrative Law Judge Kenneth A. Jennings 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).

On September 24, 1987, claimant sustained injuries to his dominant left arm and cervical spine when he fell down a flight of stairs while working for employer as a joiner. Subsequent to this injury, claimant underwent medical treatment, including two myelograms and the transposition of his ulnar nerve in his left arm. Claimant's Exhibit 7; Employer's Exhibit 15. Employer voluntarily paid claimant temporary total disability benefits from September 26, 1987 until June 1, 1988, at which time he returned to his previous position. Two weeks later, claimant was informed that a layoff was planned for his department and that he could transfer to the paint department. Claimant accepted the transfer but subsequently determined that he could not do the work required; accordingly, he transferred back to the joiner department where he was laid off due to a lack of

work. Thereafter, he performed odd jobs until he was excused from work again on April 7, 1989.

During the summer of 1990, claimant underwent an independent medical examination by Dr. William R. Bridges, a neurosurgeon, who opined that claimant had reached maximum medical improvement and was capable of returning to full-time work with certain restrictions. In October 1990, the Department of Labor retained Joe Walker, a certified vocational rehabilitation counselor, to monitor claimant's progress in employer's return-to-work program. Employer voluntarily paid claimant additional temporary total disability benefits through October 28, 1990, when claimant returned to work for employer in a modified version of his prior position as a joiner. Claimant sought permanent total disability compensation under the Act, contending that his post-injury position as a joiner did not constitute suitable alternate employment. 33 U.S.C. §908(a). Claimant also maintained that he was entitled to additional medical benefits, an assessment under Section 14(e), 33 U.S.C. § 914(e), and an attorney's fee. *See* 33 U.S.C. §928.

In his Decision and Order Awarding Additional Benefits, the administrative law judge noted that although employer did not contest the job-relatedness of claimant's left arm and cervical spine injuries, claimant's alleged thoracic back condition was not job-related. The administrative law judge awarded claimant permanent partial disability compensation for a 15 percent permanent impairment of his left arm under Section 8(c)(1) of the schedule, 33 U.S.C. §908(c)(1), but denied him compensation for his cervical neck injury under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), finding that claimant's post-injury work for employer was suitable and that claimant had not sustained any loss in his wage-earning capacity. Additionally, the administrative law judge found that claimant's average weekly wage was $411.20, that employer incorrectly recouped an alleged overpayment when it reduced payments to claimant, and that employer was liable for Section 14(e) penalties and interest. Finally, the administrative law judge denied claimant medical expenses for the services provided by Dr. Danielson, finding that the treatment in question was unauthorized.

Claimant appeals the denial of permanent total disability compensation, arguing that the administrative law judge erred in finding that claimant's post-injury job with employer as a joiner constituted suitable alternate employment and that claimant did not sustain any loss in his wage-earning capacity. Employer responds, urging that the administrative law judge's decision denying claimant permanent total disability compensation be affirmed.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. Once claimant has established that he is physically unable to return to his pre-injury employment, the burden shifts to his employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991). In order to meet this burden, the employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden of establishing suitable alternate employment by supplying light duty work to claimant which is necessary and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 224 (1986).

In the present case, as it is undisputed that claimant is no longer capable of performing his usual employment, the burden shifted to employer to establish the availability of suitable alternate employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Employer attempted to meet this burden by providing claimant with a modified version of his former job as a joiner, a position which claimant held at the time of the hearing. After considering the relevant evidence, the administrative law judge found that claimant's post-injury job for employer as a joiner constituted suitable light duty work within the limits imposed by claimant's physicians.

After review of the Decision and Order Awarding Additional Benefits, we affirm the administrative law judge's finding that employer met its suitable alternate employment burden. In determining that the light duty joiner position at employer's facility was suitable, the administrative law judge noted that Dr. Bridges, the independent medical examiner who examined claimant on August 13, 1990, at the request of the Department of Labor, assigned work restrictions of no lifting greater than 35 pounds and no overhead work for longer than 20 minutes at a time.[1] Claimant's Exhibit 12; Employer's Exhibit 23. The administrative law judge further noted that on deposition, Dr. Danielson, a neurologist who treated claimant primarily for his non-work-related thoracic back pain, expressed agreement with these restrictions and stated that claimant could work as a joiner provided that he was able to work within those limitations. While claimant asserted that he was continually forced to work beyond his limitations in this job,[2] an argument which he reiterates on appeal, the administrative law judge reasonably found that any work performed beyond his restrictions was of claimant's own choosing based on the testimony of his supervisor, Carl Robinson, and that employer should not be penalized for claimant's poor judgment. Mr. Robinson testified that he understood claimant's limitations, that work was available within those restrictions, and that claimant's limitations did not pose a problem for him. Mr. Robinson further stated that he informed claimant that he was not to exceed those restrictions and that if a problem arose he was to contact him, but he left it to claimant's discretion as to the tasks he would perform. Tr. at 113.[3]

In rejecting claimant's argument that this job was not suitable, the administrative law judge noted that claimant admitted that Mr. Robinson informed him of his expectation that claimant would work within his limitations and that Mr. Walker, the vocational rehabilitation counselor retained by

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[1]Dr. Bridges also believed that it would be advantageous that claimant be placed in a position that did not involve constant neck and head motion.

[2]Claimant testified that he had to lift curtain plate which exceeded his restrictions, and that he routinely worked overhead for extended periods of time with no breaks. Tr. at 17, 19-20, 72. These statements were confirmed by Wayne Herring, who worked with claimant for one and one-half months prior to the hearing. Tr. at 99.

[3]Mr. Robinson also noted that claimant has potential for advancement, Tr. at 126, and that he had no complaints about claimant's performance. Tr. at 118.

the Department of Labor to monitor claimant's progress in employer's return-to-work program, corroborated this conversation.[4] Finally, the administrative law judge noted that claimant's co-worker, Mr. Herring, also testified that claimant told him that he should not perform some tasks but that he chose to do so anyway, and inferred from the fact that claimant had been able to perform this job successfully for approximately a year prior to the hearing that his injuries were not as debilitating as he contends. As the administrative law judge rationally found based on the aforementioned evidence that, although claimant may have chosen to perform duties outside of his restrictions employer had provided him with a suitable light duty job which did not require that he do so, we affirm this determination.

Claimant also maintains that this work does not meet employer's burden of establishing suitable alternate employment because it is sheltered employment or, alternatively, a job which employer specifically created for him. We disagree. Inasmuch as the record reflects that the work which claimant was performing post-injury is necessary and that his job assignments are a part of the regular work performed by his department, *see* Transcript at 146-148; Claimant's Exhibit 15; Employer's Exhibit 25, this work cannot be said to constitute sheltered employment. *See Darden*, 18 BRBS at 226; *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981). While employer may have tailored the job duties of the joiner position to accommodate claimant's physical restrictions, any time light duty work is offered to an employee because he is physically or medically incapable of performing his usual work, the light duty employment will necessarily be tailored somewhat to the employee's physical limitations. *Darden*, 18 BRBS at 226.[5]

We also reject claimant's assertion that employer cannot, in any event, meet its suitable alternate employment burden by identifying a single job opening at it facility where claimant would not be capable of obtaining comparable work in the open market. When an employer has met its burden of establishing suitable alternate employment by offering claimant a job which claimant can perform within its own enterprise, the employer is not also required to show that claimant can earn wages in the open market. *Darden*, 18 BRBS at 227; *Conover v. Sun Shipbuilding & Dry Dock Co.*,

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[4]Mr. Walker also testified that he saw no contraindications to claimant's sustaining the work activities he was performing as a joiner in a modified capacity for employer. He also noted that claimant expressed confidence in Mr. Robinson's concern about safety factors, that claimant stated that he was working within capabilities and limitations, that claimant has an excellent relationship with Mr. Robinson, and that he had a good attendance record. Claimant's Exhibit 15; Employer's Exhibit 25

[5]Although claimant cites *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984) and *Mendez v. National Steel & Shipbuilding Co*, 21 BRBS 22 (1988), these cases do not support claimant's position. In *Mason*, employer failed to establish suitable alternate employment by providing claimant with a job that clearly exceeded his restrictions whereas in the present case, employer has modified claimant's job duties to accommodate his limitations. In *Mendez*, the Board held that while a job in employer's facility may constitute suitable alternate employment, to do so that job must be actually available to claimant. 21 BRBS at 24. In the present case, claimant was successfully performing the alternate work for employer at the time of the hearing.

11 BRBS 675 (1979).

Finally, claimant argues that the administrative law judge erred in concluding that he sustained no loss of wage-earning capacity based on his higher post-injury earnings because employer failed to introduce any evidence as to what his post-injury job paid at the time of claimant's injury. Pursuant to Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Although claimant correctly asserts that Section 8(h) of the Act, 33 U.S.C. §908(h), requires that the wage rates in effect for the post-injury job at the time of the injury be compared with his pre-injury earnings to account for the effects of inflation, *see generally Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1985), on the facts presented there was no need for employer to introduce evidence as to what claimant's post-injury job paid at the time of claimant's injury. Where, as in the present case, the administrative law judge finds that claimant's actual post-injury earnings are representative of his post-injury wage-earning capacity, and claimant has returned to work in the same department in the same job classification that he held pre-injury and is earning higher earnings on the same union pay scale, *see* Tr. 124-125, it is apparent that his post-injury job would have paid the same wage that claimant was earning at the time of his injury and that he has therefore sustained no economic disability. Accordingly, the administrative law judge's finding that claimant sustained no loss in his wage-earning capacity is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Additional Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge