BRB No. 01-0745

STEPHEN ALLEMENT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATON ROUGE MARINE CONTRACTORS	)	DATE ISSUED: June 14, 2002
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Order - Denying Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Terrence J. Lestelle, Andrea S. Lestelle and Philip R. Adams, Jr. (Lestelle & Lestelle), Metairie, Louisiana, for claimant.

Robert P. McCleskey and Maurice E. Bostick (Phelps Dunbar, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Order - Denying Motion for Reconsideration (2000-LHC-1086) of Administrative Law Judge James W. Kerr, 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 if they are supported by substantial evidence, are rational, and are 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 worked as a mechanic for employer, and he sustained an injury to his back in March 1995. He continued to work, but he re-injured his back in May 1995 and ceased

working on May 28, 1995. Jt. Ex. 1; Tr. at 39-41. Claimant underwent back surgery in June 1995, and returned to work for employer in a modified position as a maintenance supervisor on October 30, 1995, receiving a salary and disability compensation. He continued to work in this position until his termination on September 30, 1999. Claimant obtained a job as a shop foreman in December 1999 and worked until he was laid off on May 19, 2000. Following his layoff, claimant secured two additional post-injury positions, one from July 12 through August 19, 2000, and one from August 20, 2000, and continuing. Employer paid all disability benefits owed through September 30, 1999, and it has paid all medical benefits. Claimant filed a claim for benefits due beginning October 1, 1999.

The administrative law judge credited claimant's testimony and found him entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, as he showed he has a back injury and there were conditions at his employment which could have caused that injury. Because employer failed to present substantial evidence severing the causal nexus, the administrative law judge found that claimant's injury is work-related. The administrative law judge determined that claimant was temporarily totally disabled from May 29 through October 29, 1995, and he also found that the modified post-injury job at employer's facility was sheltered employment. Crediting claimant's treating physician, Dr. Bailey, the administrative law judge concluded that claimant's condition reached maximum medical improvement on July 30, 1996. Decision and Order at 20-21, 23-24. After considering the vocational evidence presented by both parties, the administrative law judge credited the opinion of Mr. Meunier, claimant's vocational expert, and determined that employer failed to establish the availability of suitable alternate employment because the jobs identified by its expert, Ms. Seyler, were not suitable for claimant or were not available. He also found that claimant diligently sought alternate work, and based on Mr. Meunier's opinion, he concluded that claimant has a residual wage-earning capacity of $340 per week. *Id.* at 24-25. The administrative law judge awarded claimant permanent partial disability benefits based on the difference between his average weekly wage of $1,245.05 and his residual wage-earning capacity of $340 per week from October 1, 1999, and continuing, except that during two of the periods he actually worked benefits were calculated using claimant's actual wages.[1] *Id.* at 24-26, 28. Finally, the administrative law judge awarded claimant any unpaid medical expenses and future medical benefits, and he rejected claimant's claim of discriminatory discharge, *see* 33 U.S.C. §948a, as being without merit. *Id.* at 27. In denying employer's motion for reconsideration, the administrative law judge reaffirmed his decision to give greater weight to Mr. Meunier's opinion. Employer appeals, and claimant responds, urging affirmance.

[1]For the period between December 7, 1999, and May 19, 2000, the administrative law judge used claimant's actual wage of $15 per hour, and for the period between July 12 and August 19, 2000, the administrative law judge used claimant's actual wage of $5.15 per hour to compute claimant's benefits. Decision and Order at 24-26, 28.

Employer contends the administrative law judge erred in finding that claimant's post-injury wage-earning capacity is only $340 per week, as it presented evidence of suitable alternate employment which paid higher wages, and as claimant secured a post-injury job with Scott Construction which paid $15 per hour.[2] Once a claimant establishes his inability to return to his usual work, as here, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

[2]Although employer mentions claimant's modified position at its facility as post-injury work establishing activities claimant can perform, it does not dispute the administrative law judge's finding that the maintenance supervisor position was sheltered employment. Sheltered work does not constitute suitable alternate employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). Moreover, demonstrating a claimant can perform particular physical tasks is insufficient to show the availability of suitable alternate employment. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The administrative law judge found that claimant essentially has sedentary to light duty restrictions. Dr. Bailey prohibited claimant from returning to his usual work, and he placed physical limitations on claimant's activities: only occasional lifting less than 20 pounds; minimal repetitive lifting, carrying, and pushing less than ten pounds; no driving heavy equipment or driving long distances; no prolonged sitting; and no crawling, climbing high ladders, or working at unprotected heights. Emp. Ex. 9 at 34-36. Additionally, the administrative law judge found, based on the physical therapy reports, that claimant should also avoid prolonged standing. Decision and Order at 24; Emp. Ex. 8 at 35-55. Ms. Seyler identified jobs such as service manager, shop foreman, and service advisor which she believed were suitable for claimant, and those positions paid between $30,000 and $40,000 per year or between $10 and $15 per hour. Emp. Ex. 16. Dr. Bailey approved the jobs. Emp. Ex. 16 at 3-6. However, Mr. Meunier, whom claimant hired to check Ms. Seyler's work, opined that all the jobs she found were unsuitable for claimant. Tr. at 134, 147-148, 182-188. He followed up with the contacts she identified and concluded those positions did not fall within claimant's restrictions and/or they were unavailable to claimant.[3] *Id.* Based on his experience, Mr. Meunier believed claimant could earn between $7 and $10 per hour as a dispatcher, an inventory control clerk, an order clerk, an indoor salesman, or a security guard. Tr. at 150-158. After reviewing the evidence and finding that the jobs identified by Ms. Seyler did not conform to claimant's restrictions, the administrative law judge credited Mr. Meunier's opinion over that of Ms. Seyler, as is within his discretionary powers.[4] *Cordero v. Triple A*

[3]Although Mr. Meunier agreed the specific duties of the service advisor position at M&L Industries fell within claimant's restrictions, he nevertheless concluded that the position was unsuitable for claimant. After discussing the duties with the incumbent, he found the incumbent assists with mechanic work when the shop is busy. Accordingly, Mr. Meunier stated that although claimant might not be *required* to perform mechanic's work pursuant to the job description, the precedent for doing so has been established and it would be difficult for claimant to compete with workers who are able to perform that type of work. Tr. at 147-150, 182-188. Thus, the administrative law judge reasonably found that the position at M&L Industries also is unsuitable for claimant. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

[4]Claimant does not challenge any aspect of the administrative law judge's decision. Moreover, we need not address every aspect of employer's argument regarding the specific requirements of the identified jobs or the specific dates they were available, as the administrative law judge reasonably credited the testimony of Mr. Meunier, and his opinion included these issues. Nor need we address employer's argument regarding claimant's diligence in looking for work, as claimant is not seeking total disability and his diligence, or lack thereof, is not relevant to determining whether specific jobs are suitable alternate employment. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As the administrative law judge's decision to give greater weight to Mr. Meunier's opinion is rational, we reject employer's contention that its vocational evidence establishes the availability of suitable alternate employment which paid wages higher than the $340 per week the administrative law judge found to be representative of claimant's post-injury wage-earning capacity.

Employer next contends the administrative law judge erred in failing to address whether claimant's actual post-injury job at Scott Construction constituted suitable alternate employment and whether the wages therefrom reasonably represented his post-injury wage-earning capacity. Between December 7, 1999, and May 19, 2000, claimant worked at Scott Construction as a shop foreman. He earned $15 per hour until his probationary period ended and $15.50 per hour thereafter, and he received a "competent" rating for his work performance. Emp. Ex. 13. Claimant was laid off from this position on May 19, 2000. *Id.* Although the administrative law judge did not address the suitability of this position, any error he may have made in this regard is harmless because he reduced the amount of employer's liability for partial disability benefits for that six-month period by using claimant's actual wages of $15 per hour with Scott Construction to calculate benefits. We reject, however, employer's argument that claimant's wage-earning capacity after he was laid off from Scott Construction represents his post-injury wage-earning capacity.

First, claimant was laid off from the position at Scott Construction after only six months. If a claimant is laid off from a short-term post-injury position, the position is no longer "realistically and regularly available" and does not constitute suitable alternate employment. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Additionally, in his efforts to seek new employment following the May 2000 layoff, which the administrative law judge found to be diligent, claimant was able only to secure positions as a part-time driver at Baton Rouge Auto Auction from July 12 through August 19, 2000, at an hourly rate of $5.15, Cl. Ex. 5, and as a security guard at Lofton beginning on August 20, 2000, at an hourly rate of $6.50. Cl. Ex. 8. Each of these jobs paid less than half of what claimant was making when he worked for Scott Construction, demonstrating an inability to realistically sustain a wage of $15 per hour. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990). Therefore, we reject employer's assertion that claimant's wage-earning capacity should be higher than $340 per week, and we affirm the administrative law judge's award of benefits.[5]

[5]During the period between July 12 and August 19, 2000, when claimant worked at Baton Rouge Auto Auction, the administrative law judge determined that claimant is entitled to benefits based on the difference between his average weekly wage and his actual earnings

of $5.15 per hour. Decision and Order at 25, 28. Because claimant's earnings as a security guard were more in line with his determination of claimant's wage-earning capacity, he did not adjust benefits by claimant's actual wages beginning August 20, 2000; rather, he awarded benefits based on a post-injury wage-earning capacity of $340 per week. *Id.* at 26, 28. Claimant does not challenge this finding even though his current weekly earnings at Lofton are $284.38. Cl. Ex. 8.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge