

BRB Nos. 02-0798
and 02-0798A

LINDA WATKINS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>JUN 25, 2003</u>
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Linda Watkins, Newport News, Virginia, *pro se*, for claimant as petitioner.

John H. Klein (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant as cross-respondent.

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

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (00-LHC-1616) of Administrative Law Judge Fletcher E. Campbell, 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 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 case is before the Board for the second time. Claimant sustained a work-related injury to her back on June 15, 1998. In his initial decision, the administrative law judge found that claimant was not an employee covered under Section 2(3) of the Act, 33 U.S.C. §902(3). On claimant's appeal to the Board, the Board reversed this finding, holding that, pursuant to *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), claimant's work was essential to the shipbuilding process. Specifically, the Board held that claimant's job of spending four hours each day removing shipbuilding debris from the sides of ships is integral to shipbuilding as the failure to remove this waste would inevitably impede the shipbuilding process. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002). The Board remanded the case for the administrative law judge to address any remaining issues.

On remand, the administrative law judge stated that the only issue left for his consideration was whether claimant was required to diligently seek work outside the shipyard while she waited to be recalled by employer.¹ Claimant worked for employer for two weeks in February 2000, but employer has not had suitable work available for her at any other time. Claimant regularly calls in to see if work is available, but has not otherwise sought employment.

The administrative law judge stated that the parties stipulated that employer established the availability of suitable alternate employment on the open market. He further found that claimant could not have a reasonable expectation of being recalled by the shipyard, and that therefore she had a duty to diligently seek work outside the shipyard if she wanted to establish that she is totally disabled. The administrative law judge found that claimant did not seek alternate work in a diligent manner and therefore is limited to benefits for partial disability consistent with the parties' stipulation regarding claimant's residual wage-earning capacity. The administrative law judge therefore awarded claimant temporary partial disability benefits commencing June 15, 1998. 33 U.S.C. §908(e).

On appeal, claimant, proceeding without counsel, contends that the administrative law judge erred in awarding her only partial disability benefits. On

¹The parties stipulated at the hearing that if claimant was obligated to seek alternate employment, her wage-earning capacity on the open market is \$220 per week. Tr. I at 8-10.

cross-appeal, employer contends that the Board erred in its initial decision in holding that claimant is covered under the Act pursuant to Section 2(3). Employer also contends that the compensation rate awarded by the administrative law judge is erroneous. Claimant's counsel has filed a response to employer's appeal, urging rejection of its contention concerning coverage under the Act, but agreeing that the compensation rate awarded by the administrative law judge is in error.

We first address employer's contention that the Board erred in reversing the administrative law judge's initial determination that claimant did not satisfy the status test of Section 2(3) of the Act. Employer contends that the Board erred in holding that trash removal is covered work as such activity is not unique to shipbuilding, and that, moreover, claimant was not engaged in maritime employment at the time of her injury.

The Board's decision on the coverage issue constitutes the law of the case, and, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice, the Board will adhere to its decision. *See, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). We hold that employer has not established a basis for departure from the law of the case doctrine, as there has been no change in the factual situation and employer has failed to demonstrate any error in the Board's decision. *See Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT) ("It makes no difference that the particular kind of repair [claimant] was doing might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded," as this claimant's work was essential to the loading and unloading process); *see also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Maher Terminals, Inc. v. Director, OWCP*, 330 F.3d 162 (3^d Cir. 2003), *aff'g Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001). Therefore, we affirm the Board's determination that claimant was a covered employee pursuant to Section 2(3) of the Act. *See Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

We now turn to claimant's *pro se* appeal of the administrative law judge's award of partial disability benefits. The parties stipulated that claimant is unable to return to her usual work. Tr. I at 7-8. The parties further stipulated that *if* claimant had a duty to diligently seek alternate work, then claimant retains a post-injury wage-earning capacity of \$220 per week. *Id.* at 8-10. The administrative law judge found that the parties stipulated that employer established the availability of suitable alternate employment and that claimant therefore had a duty to seek alternate work as it was not reasonable for claimant to await recall by the shipyard given the paucity of light duty work available since her injury. Thus, the administrative law judge found that claimant is limited to an award of partial disability benefits. Decision and Order on Remand at 3-4.

We cannot affirm this finding, as the record does not reflect that the parties

stipulated that employer established the availability of suitable alternate employment. Moreover, the administrative law judge's decision presumes that suitable alternate employment has been available to claimant at all times since she became unable to perform her usual work. Once, as here, claimant establishes her inability to return to her usual work, the burden shifts to employer to demonstrate the availability of alternate employment that is suitable for claimant given her physical restrictions, age, education, and vocational history. 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). Employer may meet its burden of establishing suitable alternate employment by offering claimant work at its facility within claimant's restrictions. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If employer provides claimant with suitable work at its facility, but withdraws this employment due to reasons other than claimant's misconduct, employer is liable for total disability benefits unless it shows the availability of other suitable alternate employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). Claimant is not required to seek work until employer establishes the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); see also *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). If claimant diligently, yet unsuccessfully, seeks alternate employment, she remains entitled to total disability benefits. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991).

Contrary to the administrative law judge's finding that the parties stipulated that employer established the availability of suitable alternate employment, the parties stipulated only that claimant retains a residual wage-earning capacity of \$220 per week *if* she was obligated to seek alternate employment. Tr. I at 8-14; see also Cl. Post-hearing brief (seeking temporary total disability benefits); Emp. Post-hearing brief (asserting suitable alternate employment established by way of its labor market survey). Claimant's duty to seek such work, however, does not arise until employer establishes suitable alternate employment. *Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT). Claimant was injured on June 15, 1998, and performed some work at the shipyard until October 1999. Employer recalled claimant for only two weeks in February 2000. Tr. I at 41. Unless employer establishes the availability of other suitable alternate employment, it is liable for total disability benefits for the periods during which claimant was not working at its facility. *Hord*, 193 F.3d 797, 33 BRBS 170(CRT); see also *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Employer submitted into evidence a labor market survey, which the administrative law judge did not address. EX 1. We must, therefore, remand the case to the administrative law judge to determine if, through this labor market survey, employer established the availability of suitable alternate employment on the open market. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Claimant is entitled to total disability benefits until the date suitable alternate employment is shown to have been available. See, e.g., *Stevens*

v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Once suitable alternate employment is established, claimant must establish that she diligently, yet unsuccessfully, sought suitable alternate employment in order to retain entitlement to total disability benefits. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT). The administrative law judge found that claimant did not seek any work, and that it was unreasonable for her to rely on being recalled by the shipyard in view of the lack of work over the passage of time. This finding is rational and supported by substantial evidence. See Tr. I at 33; *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Thus, claimant is limited to an award of partial disability benefits after suitable alternate employment is established, based on the stipulated post-injury wage-earning capacity of \$220 per week. 33 U.S.C. §908(e), (h). We, therefore, vacate the administrative law judge's award of partial disability benefits commencing June 15, 1998, and we remand the case for further findings consistent with this decision.

Employer contends that the administrative law judge erred in entering an award based on an incorrect compensation rate, and in not setting forth the specific days for which it is liable for benefits. Claimant concurs that the administrative law judge utilized the incorrect compensation rate and states that she is willing to work out with employer the number of days claimant worked post-injury.² The parties stipulated that claimant's average weekly wage is \$559.34, and that her post-injury wage-earning capacity is \$220. Two-thirds of the difference between these figures is \$226.23, and not \$226.34, as awarded by the administrative law judge.³ Thus, in the event that the administrative law judge again awards claimant partial disability benefits, the compensation rate is modified to \$226.23. On remand, moreover, the administrative law judge should elicit from the parties specific evidence or stipulations, to be admitted into the record, concerning the exact number of days claimant worked post-injury, and in what capacity, in order that the award of benefits reflects claimant's true entitlement. See generally *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

Claimant's attorney has filed a fee petition for work performed before the Board in the initial appeal in this case, BRB No. 01-0538. Counsel seeks a fee of \$3,256.50 for 2.74 hours of attorney services at \$225 per hour, 16 hours of attorney services at \$160 per hour, and one hour of paralegal services at \$80 per hour. Employer has not responded to counsel's fee petition.

We award counsel the full fee requested. Counsel was fully successful in

²The administrative law judge noted that the record is unclear as to how many days claimant worked between June 15, 1998 and October 1999. He, therefore, left "it to the parties to sort this out," and stated he would entertain a motion for reconsideration, which was not forthcoming. Decision and Order on Remand at 4 n.4.

³ $\$559.34 - \$220 = \$339.34$. $(\$339.34 \times 2) \div 3 = \226.23 .

claimant's initial appeal to the Board in that the Board reversed the administrative law judge's finding that claimant was not covered by the Act, 33 U.S.C. §902(3), and claimant obtained an award of benefits on remand. Moreover, the fee requested is reasonably commensurate with the necessary work performed and the requested hourly rates are reasonable and customary for the geographic area where the services were performed. 20 C.F.R. §802.203. Therefore, we award claimant's counsel an attorney's fee of \$3256.50 for work performed before the Board in BRB No. 01-0538. The fee is payable by employer directly to claimant's attorney.

Accordingly, the administrative law judge's award of temporary partial disability benefits is vacated, and the case is remanded for further findings consistent with this decision. The compensation rate for partial disability is modified to \$226.23 per week. Claimant's counsel is awarded an attorney's fee of \$3256.50 for work performed in BRB No. 01-0538.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge