BRB No. 03-0649

CYNTHIA R. DANIELS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DATALINE, INCORPORATED	)	DATE ISSUED: JUN 14, 2004
	)	
and	)	
	)	
ROYAL INSURANCE COMPANY c/o FARA, INCORPORATED	)	
	)	
Employer/Carrier- Respondents	)	DECISION and ORDER

Appeal of Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-3049) of Administrative Law Judge Richard E. Huddleston 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).

Claimant, a firewatch, sustained a work-related injury on April 4, 2000. Employer voluntarily paid claimant temporary total disability benefits from April 8, 2000, until April 17, 2000, when she returned to work for employer as an administrative assistant. Claimant was laid off from that position on September 8, 2000, as part of a company-wide economic reduction-in-force. Thereafter, claimant filed a claim for temporary total disability benefits from September 8, 2000, to March 4, 2001, and for continuing temporary partial disability benefits from March 5, 2001, when she began her employment as a sales associate with Dillard's Department Store.

In his Decision and Order, the administrative law judge found, after comparing the physical restrictions imposed by Dr. Nichols to claimant's job duties, that claimant established she is unable to perform her pre-injury job as a firewatch. The administrative law judge then found that claimant's placement in the administrative assistant job was a promotion to a higher paying, permanent job and that, although the physical requirements are lighter than those of the firewatch, the administrative assistant job was not a "light-duty" job. The administrative law judge found that claimant's physical restrictions did not affect the performance of the new job, and that it became her "usual employment" such that she failed to establish that her work injury prevented her from returning to her "usual employment" as an administrative assistant at the time of the economic layoff. The administrative law judge found that because claimant earned higher wages as an administrative assistant than she did as a firewatch she did not establish any loss of wage-earning capacity. The administrative law judge therefore denied claimant any additional benefits.

On appeal, claimant contends that the administrative law judge erred in characterizing claimant's position as an administrative assistant as her usual employment. Claimant contends that this job constituted suitable alternate employment and that she is entitled to total disability benefits when this job was withdrawn for economic reasons and to partial disability benefits upon her obtaining a job at Dillard's. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

We agree with claimant that the administrative law judge's denial of benefits cannot be affirmed. In order to establish a *prima facie* case of total disability, claimant must initially establish that she cannot return to her usual employment due to her work-related injury. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Claimant's usual work is that which she was performing at the time of her injury. Because claimant was working as a firewatch when she was injured, only this job, and not her subsequent job as an administrative assistant, can constitute her "usual" employment for purposes of establishing her *prima facie* case. *See Manigualt v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). The administrative law judge found when he compared claimant's job

responsibilities to her medical restrictions that claimant could not return to her pre-injury firewatch position. Decision and Order at 6. This finding is not challenged on appeal.

Once, as here, claimant establishes that she is physically unable to return to her pre-injury employment because of her work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. In order to meet its burden, employer must demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides which claimant, by virtue of her age, education, work experience, and physical restrictions is capable of performing and could secure if she diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); s*ee also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer can satisfy this burden by providing claimant with a suitable job at its own facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). If employer establishes suitable alternate employment in this manner, as employer did in the instant case, employer bears a renewed burden of establishing suitable alternate employment when claimant is laid off from the job at employer's facility for economic reasons, in order to defeat claimant's entitlement to total disability benefits. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). Contrary to the administrative law judge's finding, this burden is in no way affected by the suitability of the alternate position, by the fact that claimant had no loss in wage-earning capacity in the position, or by the economic nature of the layoff. The Fourth Circuit emphasized that under such circumstances, it is the lack of *availability* of the suitable position at employer's facility that compels the renewal of employer's burden to establish suitable alternate employment. *Id.*

Thus, we must remand this case to the administrative law judge for reconsideration of claimant's entitlement to benefits. Claimant is entitled to total disability benefits upon her release by employer on September 8, 2000, until claimant obtained a position at Dillard's on March 4, 2001, unless employer establishes that there was a range of suitable jobs available to claimant during this period. *Id.*; *see also Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). In this regard, employer must address the testimony of employer's rehabilitation counselor and her vocational report. Tr. at 101 *et seq.;* EX 9. In addition, there is evidence that claimant may have her own photography business and that employer offered to rehire claimant sometime in 2001. Tr. at 92, 97;[1] *see Stratton v.*

[1] On remand, the administrative law judge should address employer's contentions concerning claimant's failure to provide wage information pursuant to employer's Request for the Production of Documents. If claimant was self-employed as a

Weedon Engineering Co., 35 BRBS 1 (2001) (*en banc*); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). If the administrative law judge finds suitable alternate employment established, he must determine claimant's post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), and if claimant has a loss thereof, in comparison to her average weekly wage at the time of injury in April 2000.[2] 33 U.S.C. §908(e); *see generally Newport News Shipbuilding & Dry Dock Co. v. Stallings,* 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001); *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for findings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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photographer both before and after her injury, and the wages of this position were not included in claimant's average weekly wage, they should not be taken into account in computing claimant's post-injury wage-earning capacity. *See generally Harper v. Office Movers/I.E. Kane, Inc.*, 19 BRBS 128 (1986).

[2] By seeking only temporary partial disability from March 4, 2001, claimant in effect concedes that the position at Dillard's constitutes suitable alternate employment. The administrative law judge, however, is not constrained to find that this position establishes claimant's wage-earning capacity if he finds other suitable positions were available during the period in which claimant was able to work. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).