BRB No. 04-0798

GILDA Y. ALEXIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: 06/22/2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Leonard A. Washofsky, Metairie, Louisiana, for claimant.

Maurice E. Bostwick (Galloway, Johnson, Tomkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2003-LHC-2825) of Administrative Law Judge Larry W. Price 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 roster clerk for employer, being assigned to the gatehouse, warehouse, or yard, as needed. She injured her neck on January 29, 2001, and was

diagnosed with cervical disc herniation, cervical stenosis, and cervical myloradiculopathy. On July 29, 2002, she underwent a cervical disc discectomy and fusion at levels C4-5, C5-6, and C6-7. Emp. Ex. 11. Employer paid medical and disability benefits. Following surgery, she was examined by three doctors: Dr. Hamsa, her treating orthopedic surgeon, his partner, Dr. Pribil, who performed the surgery, and Dr. Steiner, employer's expert. Emp. Exs. 11, 13, 16. Based on their opinions, the administrative law judge found that claimant's condition reached maximum medical improvement as of January 21, 2003, but she could not return to her usual work as a roster clerk. Decision and Order at 14-15. On February 10, 2003, employer offered claimant a permanent position as a gatehouse clerk, stating it would make any reasonable accommodations claimant needed and would pay her at her pre-injury wages. Emp. Ex. 7; Tr. at 38-43, 78-79. Although this position remained available to claimant as of the date of the hearing, she had not attempted to return to work or contacted employer about it. Tr. at 42-43. The administrative law judge awarded claimant temporary total disability compensation for the period from September 27, 2001 through January 20, 2003, and permanent total disability compensation for the period from January 21, 2003 through February 10, 2003. However, as he found that the position offered by employer constituted suitable alternate employment available after claimant's condition reached maximum medical improvement, he determined that claimant was not entitled to permanent total disability benefits after February 10, 2003. Decision and Order at 17. Claimant appeals, arguing that she cannot perform the work of a gatehouse clerk. Employer responds, urging affirmance.

Once a claimant establishes her inability to return to her usual work, as here, the burden shifts to the 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 work 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). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

The administrative law judge found that the gatehouse clerk position offered by employer would require claimant to answer the phone and input information into a computer to receive and dispatch containers, and that she could sit or stand as desired. He also found that claimant could take breaks as needed, there are lulls in the activity,

and employer has offered to accommodate claimant's restrictions. Decision and Order at 17. These findings are supported by substantial evidence of record. Emp. Ex. 6; Tr. at 22, 36, 38, 40. Moreover, substantial evidence supports the administrative law judge's conclusion that the work is suitable.

First, the administrative law judge credited the opinion and report of Mr. Naquin, the physical therapist who performed the function capacity evaluation. Mr. Naquin concluded that claimant did not exert maximum effort and that she showed signs of symptom magnification. Tr. at 216-218, 223-224. The administrative law judge also stated that the job offered to claimant satisfied the restrictions set forth by Dr. Pribil,[1] despite the fact that Dr. Pribil did not believe claimant could perform the job due to her subjective complaints of pain. Emp. Exs. 11-12, 19. Additionally, he credited the opinions of Dr. Steiner, who based his decision on the job description, and Dr. Stokes, who observed other employees performing the work, as both agreed claimant could perform the duties of a gatehouse clerk.[2] Emp. Ex. 14 at 33; Emp. Ex. 20; Tr. at 199-201. Finally, although the administrative law judge found claimant to be a "fairly credible witness," he questioned the validity of her subjective complaints of pain compared with the objective medical evidence, and he gave weight to the fact that she had not attempted this job since reaching maximum medical improvement. Decision and Order at 13-14, 17.

It is within the administrative law judge's discretion to determine the weight to be accorded to the evidence of record. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A 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); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *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 substantial evidence supports the administrative law judge's finding that the

[1]Dr. Pribil limited claimant's strenuous use of her upper extremities, and he told her to avoid climbing, working at elevations without protection, crouching, stooping, twisting, bending, working overhead, and lifting over 20 pounds. Emp. Exs. 11-12, 19.

[2]Dr. Stokes stated that the position was a sedentary, office-type, position with virtually no lifting requirements, other than carrying office supplies such as paper and staplers, allowing claimant to sit or stand as necessary. Emp. Ex. 20; Tr. at 199. He also testified that, as employer offered, there are tables that adjust so as to allow claimant to either sit or stand while working at the computer. Tr. at 201. Dr. Hamsa also agreed that claimant could perform the duties of the gatehouse clerk. Emp. Ex. 17 at 41-42.

gatehouse clerk position is a sedentary position within the restrictions set for claimant, the administrative law judge's finding that employer established suitable alternate employment at its own facility is affirmed.[3] *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002) (table); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997). Further, as claimant admitted she did not attempt to return to this, or any, work, claimant did not establish diligence in seeking employment, and the administrative law judge's termination of benefits as of the date the job was offered is supported by substantial evidence. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Dionisopoulos v. Pete Pappas & Sons*, 16 BRBS 93 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[3]Employer offered to pay claimant her pre-injury wages, and there is no contention that claimant sustained a loss in wage-earning capacity.