

OTHA JARRETT)
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 Claimant-Petitioner)
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 v.)
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 COOPER/T. SMITH STEVEDORING) DATE ISSUED: 03/30/2006
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

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

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Swartz and Goodove, P.C.), Norfolk, Virginia, for claimant.

Donna White Kearney and Audrey Marcello (Taylor & Walker P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-01347) 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 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 injured his neck, head, and knees on July 25, 2002, during the course of his employment for employer as a hustler driver. Claimant's treating physician, Dr. Gurtner, diagnosed acute spinal cord compression. Claimant retired from longshore work on September 19, 2002. Claimant underwent an anterior cervical decompression and fusion at C3-4 and C4-5 on November 4, 2002. Dr. Gurtner assigned permanent work restrictions, including no overhead activity, bending, and lifting more than 10 pounds.

Employer voluntarily paid claimant compensation for temporary total disability from July 26, 2002, to June 24, 2004. Employer also paid compensation prior to the hearing on October 21, 2004, for permanent partial disability from June 25 to October 20, 2004. The parties stipulated that claimant had an average weekly wage of \$1,854.93 at the date of injury.

In his decision, the administrative law judge credited the work restrictions of Dr. Gurtner and found that claimant is unable to return to his usual employment as a hustler driver. He also found that claimant's work injuries reached maximum medical improvement on November 12, 2004. The administrative law judge next addressed employer's evidence of suitable alternate employment. He found that employer's offer on June 25, 2004, of a job at its facility as a fueling assistant is necessary work, which employer agreed to tailor to claimant's physical restrictions. This job paid \$1,040 per week at the time of claimant's injury. In addition, the administrative law judge credited the testimony and labor market survey of Dasha Little to find that employer established the availability of suitable alternate employment on the open market. The administrative law judge found that claimant could earn \$9.65 per hour on the open market. The administrative law judge found that claimant failed to seek suitable work in a diligent manner as he did not attempt to fill the fueling assistant position employer offered nor did he apply for any of the jobs listed in the labor market survey. Claimant was awarded compensation for temporary total disability as previously paid by employer, temporary partial disability of \$314.28 per week from June 25 to November 12, 2004, and continuing weekly compensation of \$314.28 thereafter for permanent partial disability benefits based on the wages paid by fueling assistant job. 33 U.S.C. §908(b), (c)(21), (e), (h).

On appeal, claimant challenges the administrative law judge's finding that the fueling assistant position is suitable work within his physical restrictions.¹ Employer responds, urging affirmance.

Where, as in this case, it is undisputed that claimant is unable to perform his usual employment duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area

¹ Claimant does not challenge the administrative law judge's finding that the labor market survey establishes the availability of suitable alternate employment and a corresponding post-injury wage-earning capacity of \$9.65 per hour.

where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer can meet its burden by offering claimant a suitable job in its facility, including a light-duty job. *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).

In this case, the administrative law judge found that employer met its burden by its job offer of a position as a fueling assistant, which employer made available to claimant on June 25, 2004. EX 19. The administrative law judge credited the testimony of George Brown, employer's vice president of east coast operations, regarding the necessity of the proposed job duties of refueling and checking fluid levels of the vehicles at employer's facility. Decision and Order at 9-10; *see* Tr. at 41-43, 50-51. The administrative law judge credited employer's evidence that it would tailor the position to suit claimant's physical restrictions over the opinions of Dr. Gurtner and Dr. Warren, a marine engineering consultant, that the job is not suitable given claimant's restrictions. *Compare* EXs 30-40 with CXs O, P. The administrative law judge found that these opinions did not address employer's willingness to modify the job duties to accommodate claimant's work restrictions. Decision and Order at 10. The administrative law judge credited employer's evidence that it would purchase an aluminum nozzle, swivel, and smaller hose so that claimant's 10-pound lifting restriction would not prevent him from fueling vehicles EXs 30-32. Employer further agreed to allow claimant to use a one-gallon can to refuel vehicles outside its fueling station. EX 40. The administrative law judge also found that employer agreed to have someone available to lift heavy hatch covers so claimant could check fuel levels. Decision and Order at 10. In this regard, Mr. Brown affirmed that accommodations could be made as needed to modify the duties of the fueling assistant position to claimant's work restrictions. Tr. at 43.

The administrative law judge acted within his discretion in crediting employer's evidence, including the testimony of Mr. Brown, regarding the necessity of the light-duty position within employer's facility and employer's willingness to accommodate claimant's physical restrictions, over the opinions of Drs. Gurtner and Warren, on the basis that these opinions did not consider employer's willingness to modify claimant's job duties to accommodate claimant's work restrictions.² *See generally Calbeck v.*

² In this regard, claimant appended to his brief accompanying his Petition for Review a letter dated January 31, 2005, from claimant's counsel to the administrative law judge, in which he summarized a telephone conversation that day with Dr. Warren. Counsel stated Dr. Warren's opinion that employer's proposed accommodations are insufficient to comply with claimant's physical restrictions. Because there is no indication that this letter was admitted into the record, we cannot consider this document under the Board's standard of review. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards*,

Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). In light of these findings, we affirm the administrative law judge's conclusion that by offering claimant a light-duty position within its facility, employer established suitable alternate employment as of June 25, 2004, as it is supported by substantial evidence. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Accordingly, we affirm the administrative law judge's award of compensation for temporary partial disability from June 25 to November 12, 2003, and continuing compensation thereafter for permanent partial disability at a weekly compensation rate of \$314.28, as it is rational, supported by substantial evidence and in accordance with law.³

Geosource, Inc., 17 BRBS 32 (1985); 20 C.F.R. §802.301. Claimant may seek modification pursuant to Section 22, 33 U.S.C. §922, if he wishes the administrative law judge to address this letter.

³ Claimant avers that his wage-earning capacity should be \$9.65 per hour. As we have affirmed the administrative law judge's finding that the fueling assistant position constitutes suitable alternate employment, we affirm the administrative law judge's determination that claimant's post-injury wage-earning capacity should be based on the wages this position paid at the time of claimant's injury. *See generally Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge