

JAMES E. BRUMSKIN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>Nov. 30, 2004</u>
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk,  
Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-0574, 0575) 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 findings of fact and conclusions of  
law of the administrative law judge which are rational, supported by substantial evidence,  
and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman &  
Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On February 15, 1990, claimant sustained a left knee injury during the course of  
his employment as a welder for employer. Following his injury, claimant returned to  
light-duty work at employer's shipyard for about six months and thereafter performed his  
usual work duties until being laid off in 1994. Claimant then underwent four surgeries to  
his left knee, culminating in a total knee replacement in 1997. In 1998, claimant began to  
experience problems with his right knee as a consequence of his previous left knee injury.

Employer voluntarily paid claimant various periods of temporary total and temporary partial disability compensation. 33 U.S.C. §908(b), (e). In addition, employer voluntarily paid claimant permanent partial disability compensation under the schedule for a 50 percent impairment of the left leg. 33 U.S.C. §908(c)(2), (19).

In his Decision and Order, the administrative law judge accepted the parties' stipulations, *inter alia*, that claimant's left and right knee impairments are causally related to his employment, that claimant is unable to perform his usual work due to his work-related injuries, and that claimant was offered a job as an unarmed security guard with James York Security which he declined. Next, the administrative law judge determined that claimant reached maximum medical improvement on November 20, 2001. With respect to the issue of the extent of claimant's disability, the administrative law judge found that employer failed to establish the availability of suitable alternate employment. The administrative law judge therefore awarded claimant temporary total disability compensation from February 15, 1990 to November 20, 2001 and permanent total disability compensation thereafter.

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the instant case, claimant has established that he is unable to perform employment duties due to a work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264, 31 BRBS 119, 124(CRT) (4<sup>th</sup> Cir. 1997). *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4<sup>th</sup> Cir. 1994); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4<sup>th</sup> Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4<sup>th</sup> Cir. 1984). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has stated that an employer satisfies this burden "[b]y proving that the injured employee retains the capacity to earn wages in regular, continuous employment." *See*, 36 F.3d at 380, 28 BRBS at 100(CRT)(quoting *Lentz*, 852 F.2d at 131, 21 BRBS at 112(CRT)). The Fourth Circuit has further explained that "[r]elevant factors in this inquiry include the claimant's age, background, employment history and experience, and intellectual and physical capabilities, and the reasonable availability of jobs in the community for which the claimant is able to compete and which he could realistically and likely secure." *See*, 36 F.3d at 380, 28 BRBS at 100 (internal quotation marks and citations omitted). If the employer meets its burden of demonstrating the availability of suitable alternate employment, the claimant is only partially disabled. Where the injury is to a scheduled member, any award of permanent partial disability compensation is limited to the schedule, 33 U.S.C. §908(c)(1)-(20), and wage-earning capacity is irrelevant. *See Potomac Electric Power Co. [PEPCO] v.*

*Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4<sup>th</sup> Cir. 1998).

In challenging the administrative law judge's determination that it failed to establish the availability of suitable alternate employment, employer first contends that the administrative law judge erred in finding that the stocker position at the Fort Eustis Commissary was not demonstrated to be suitable for claimant. We disagree. Having credited evidence that the commissary stocker position entailed production standards, the administrative law judge found that this position had not been demonstrated to be suitable because there was no evidence claimant was capable of meeting the job requirements. *See* Decision and Order at 12-13; Tr. at 37; CXs 20 at 55; 28 at 14-15. In this regard, the administrative law judge observed that the evidence proffered by employer does not specify what the production quotas are, whether claimant is capable of meeting the quotas, and what the result would be if claimant were unable to meet the quotas. *See* Decision and Order at 12. The administrative law judge's determinations in this regard are rational, and his finding is supported by the record. Accordingly, we affirm the administrative law judge's finding that the commissary stocker position identified by employer is insufficient to establish the availability of suitable alternate employment. *See generally* *See*, 36 F.3d 375, 28 BRBS 96(CRT); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Trans-State*, 731 F.2d 199, 16 BRBS 74(CRT); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer next contends that the administrative law judge erred in finding that employer's evidence regarding the seasonal, part-time position as an unarmed security guard with James York Security offered to claimant was insufficient to establish the availability of suitable alternate employment. The administrative law judge properly acknowledged that the Board has held that where an employer has secured an actual, specific job offer for claimant, this offer standing alone can satisfy employer's burden of establishing suitable alternate employment if claimant is capable of performing the offered job.<sup>1</sup> *Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246 (1990). The administrative law judge concluded, however, that this job offer did not meet employer's burden of demonstrating suitable alternate employment on the basis that, assuming that Dr. Phillips' approval of the position establishes claimant's ability to physically perform the job, the evidence of record is insufficient to provide a basis for determining claimant's residual wage-earning capacity in this position. *See* Decision and

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<sup>1</sup> In *Shiver*, the Board acknowledged the ruling of the Fourth Circuit in *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), that a single job *opening* is insufficient to satisfy an employer's burden of demonstrating that a range of jobs exists for which the claimant is able to compete and which he is realistically able to secure and perform. However, the Board reasoned in *Shiver* that the fact that the employer was able to secure an *actual job offer* for the claimant overcomes the concern expressed by the court in *Lentz* regarding the likelihood of the claimant's being able to obtain the single job opening identified by the employer. *Shiver*, 23 BRBS at 252.

Order at 13-14. We are unable to uphold the administrative law judge's rejection of the security guard job offer on this basis. Where, as in the instant case, the claimant's work-related injury is to a scheduled member, it is unnecessary to determine the wage-earning capacity associated with a job identified by the employer as suitable alternate employment. *See PEPCO*, 449 U.S. 268, 14 BRBS 363; *Gilchrist*, 135 F.3d 915, 32 BRBS 15(CRT). Since the job offer, if found suitable, would demonstrate that claimant is not totally disabled and the schedule exclusively determines claimant's compensation without regard to the effect of the injury on claimant's earning capacity, the administrative law judge erred in finding that the security guard job offer does not constitute suitable alternate employment on the basis that the evidence regarding this position did not allow him to ascertain claimant's residual wage-earning capacity. We must therefore vacate the administrative law judge's finding that claimant is totally disabled and remand the case for the administrative law judge to further consider whether employer met its burden of establishing suitable alternate employment with its evidence that claimant was offered part-time, seasonal employment as an unarmed security guard with James York Security.

In remanding this case, we reject claimant's contention that the administrative law judge is foreclosed from finding that the security guard job offer constitutes suitable alternate employment solely by virtue of its status as a part-time position. *See* Cl. resp. br. at 23; *Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985). Claimant additionally avers that the lack of continuity of the security guard position renders that position insufficient to establish suitable alternate employment. The administrative law judge may consider claimant's position in this regard on remand in evaluating whether this job offer satisfies employer's burden of demonstrating the availability of suitable alternate employment. Specifically, the Fourth Circuit has described an employer's burden of establishing the availability of suitable alternate employment in terms of demonstrating that the claimant "retains the capacity to earn wages in *regular, continuous* employment." *See*, 36 F.3d at 380, 28 BRBS at 100(CRT)) (quoting *Lentz*, 852 F.2d at 131, 21 BRBS at 112(CRT)(emphasis supplied). *Accord DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT)(8<sup>th</sup> Cir. 1998); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Thus, on remand, the administrative law judge should consider the evidence with respect to the regularity and continuity of the security guard position in determining whether this job offer satisfies employer's burden of establishing the availability of suitable alternate employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *See*, 36 F.3d at 375, 28 BRBS at 96(CRT); *Lentz*, 852 F.2d at 129, 21 BRBS at 109(CRT). Moreover, the administrative law judge should consider all of the medical, vocational and other evidence of record relevant to an inquiry into whether employer met its burden of rebutting claimant's *prima facie* case of total disability.<sup>2</sup> *Id.*

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<sup>2</sup> In this regard, claimant avers that the vocational counselors' opinions that claimant is incapable of substantial gainful employment must be considered in assessing

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration 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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JUDITH S. BOGGS  
Administrative Appeals Judge

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the extent of claimant's disability. *See* Cl. resp. br. at 26-27; CX-1; 3. Claimant additionally contends that evidence of the distance between claimant's residence and the security guard position with James York Security is relevant to the determination of whether the job is suitable for claimant and is located in the appropriate geographic area. *See id.* at 24-25; *see generally See*, 36 F.3d at 383-384, 28 BRBS at 105(CRT). On remand, the administrative law judge should consider whether the evidence cited by claimant is material to the inquiry into whether employer satisfied its burden of establishing suitable alternate employment.