BRB No. 00-0253

ROBERT CURRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 31, 2000
	)	
	)	
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.

Christopher A. Taggi (Mason, Cowardin & Mason), Newport News, Virginia, for claimant.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-0523) of Administrative Law Judge Fletcher E. Campbell, Jr., awarding disability benefits 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, an electrician in employer's X31 department, injured his left knee at work in March 1998. On April 15, 1998, claimant received a notice that he would be laid off from employer effective June 15, 1998. Claimant sought treatment with Dr. McCoy for his left knee injury on June 8, 1998. At that time, Dr. McCoy restricted claimant from crawling, squatting, kneeling, and climbing stairs and ladders. On June 17 or 18, 1998, claimant

accepted a job offer as an electrician with Central Radio, conditioned on the lifting of the restrictions imposed by Dr. McCoy. Claimant's restrictions were lifted by Dr. McCoy on June 29, 1998, but claimant did not start working for Central Radio until July 8, 1998, at its request. Claimant sought temporary total disability benefits from June 9 through June 29, 1998, the period of time during which his restrictions were in effect.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant established his *prima facie* case of total disability from June 16 through June 29, 1998. The administrative law judge found that employer did not establish the availability of suitable alternate employment during this time period, and alternatively, that, even if did, claimant established that he diligently sought employment after he was laid off. Thus, the administrative law judge awarded claimant temporary total disability benefits from June 16 through June 29, 1998.[1]

On appeal, employer challenges the administrative law judge's award of temporary total disability benefits from June 16 through June 29, 1998. Claimant responds in support of the administrative law judge's award.

Employer contends that the administrative law judge erred in awarding claimant temporary total disability benefits from June 16 through June 29, 1998, as it established the availability of suitable alternate employment and claimant did not establish diligence in seeking alternate employment. Where the parties stipulate that claimant is unable to perform his usual employment duties due to a work-related injury, as here, 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); *See v.*

[1]The administrative law judge denied claimant temporary total disability benefits on June 9, 1998, because employer offered claimant a job on that day but he refused it. *See* Decision and Order at 5. The administrative law judge, however, awarded claimant temporary total disability benefits from June 10 through June 15, 1998, finding that claimant was engaged in sheltered employment for employer during this period as claimant did nothing at work but was paid his full salary. *See* Decision and Order at 5-6. Employer does not contest this finding.

Washington Metropolitan Area Transit Authority, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT)(4th Cir. 1994); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). In order to defeat employer's showing of the availability of suitable alternate employment, claimant must establish that he diligently pursued alternate employment opportunities but was unable to secure a position. *See Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991).

In determining that employer did not establish the availability of suitable alternate employment from June 16 through June 29, 1998, the administrative law judge initially acknowledged that claimant was physically and mentally capable of performing at least some of the jobs identified by employer in its retrospective labor market survey dated December 2, 1998.[2] However, the administrative law judge rationally, and within his discretion, found that employer did not establish the availability of suitable alternate employment as it did not show that claimant could compete with applicants willing to work for longer periods of time, noting that claimant would have had to notify potential employers that he would be starting a new job in less than three weeks' time. The administrative law judge noted in this regard that the Fourth Circuit stated in *Tarner* that "[j]ob availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person genuinely seeking work with his determined capabilities." *Tarner*, 731 F.2d at 202, 16 BRBS at 76 (CRT)(administrative law judge's emphasis), quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981); Decision and Order at 6-7; Emp. Ex. 9; Tr. at 54-103. As the administrative law judge rationally found that the jobs identified were not realistically available to someone who could work for only several weeks, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment from June 16 through June 29, 1998.

[2]In its labor market survey, employer identified the following positions, available to claimant in June 1998, and all of them were approved by Dr. McCoy as within claimant's physical restrictions: small parts assembler, sub-assembler, unarmed security guard, cashier, contact lens assembler/lathe operator, and front desk clerk. *See* Emp. Exs. 9, 12; Tr. at 59-70.

In concluding, alternatively, that claimant established diligence in seeking alternate employment, the administrative law judge found that it was reasonable and diligent of claimant to accept Central Radio's offer and to abandon his search for other jobs thereafter. Based on the facts of this case, wherein claimant accepted a job with a new employer within two to three days of his layoff from employer, but did not start immediately due to his work restrictions as a result of a work injury at employer's facility and upon the new employer's request, we hold that the administrative law judge rationally found that claimant diligently sought and obtained alternate work, such that he is entitled to total disability benefits while the restrictions were imposed and he was unable to work at his newly obtained employment.[3] *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999)*; Livingston v. Jacksonville Shipyards*, 32 BRBS 123 (1998); Decision and Order at 7-8; Tr. at 22-23, 36, 110. We, therefore, affirm the administrative law judge's award of temporary total disability benefits to claimant from June 16 through June 29, 1998.[4]

Accordingly, the administrative law judge's award of temporary total disability benefits from June 16 through June 29, 1998, is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]We note, moreover, that claimant obtained a job on his own initiative six months before employer retroactively identified alternate positions suitable for claimant.

[4]In light of our disposition of this case, we need not address employer's contention regarding the administrative law judge's refusal to reach the issue of whether claimant would be entitled to a "grace period" in which to seek employment. *See* Decision and Order at 6, 8 n. 7; Emp. Br. at 11-13. Apparently, claimant's assertion that the Act allows him a reasonable time in which to find other employment or to show diligence in his job search, which claimant referred to as a "grace period," is based on Virginia state workers' compensation law which does not require a claimant to "market" (*i.e.*, establish diligence) during brief periods of disability such as the 14-day disability in this case. *See Holly Farms Foods, Inc. v. Carter*, 422 S.E. 2d 165 (Va. Ct. App. 1992); Cl. Br. at 8-10.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge