BRB No. 03-0174

YANCY D. HARRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATED ISSUED: Oct. 30, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1134) 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).

On November 20, 1995, claimant sustained an injury to his left knee during the course of his employment with employer. Following surgery, claimant returned to full duty work with employer. Claimant continued to experience problems with his knee and, after he was given work restrictions by his treating physician, he commenced light-duty work for employer until he was laid off on April 6, 2000. Employer voluntarily paid claimant permanent partial disability compensation under the schedule for a 15 percent impairment to claimant=s left knee. 33 U.S.C. '908(c)(2). Claimant subsequently sought permanent total

disability compensation from April 6, 2000, and continuing.

The only issue before the administrative law judge was claimant=s entitlement to permanent total disability compensation. In his Decision and Order, the administrative law judge found that employer presented evidence of a range of suitable alternate employment opportunities that were available to claimant, and that claimant did not affirmatively establish that he had undertaken a reasonable and diligent job search following his lay-off by employer. Accordingly, the administrative law judge denied claimant=s claim for ongoing permanent total disability benefits.

On appeal, claimant challenges the administrative law judge=s denial of his claim for continuing permanent total disability benefits from April 6, 2000. Employer has not filed a response brief.

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT)(4th Cir. 1988); *see also Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT)(4th Cir. 1984). Employer may meet its burden by showing the availability of a range of job opportunities within the geographic area 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). In attempting to satisfy its burden, employer need not contact prospective employers to inform them of the qualifications and limitations of the claimant and to determine if they would in fact consider hiring the candidate for their position. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT). Moreover, employer need not contact the prospective employers in its labor market survey to obtain their specific requirements before determining whether the claimant would be qualified for such work. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). In *Moore*, the Fourth Circuit stated that although such a specific description of an alternate employment opportunity might increase the precision of vocational surveys, such precision is not necessary since the claimant is able to correct any overbreath in a survey by demonstrating the failure of his good faith effort to secure employment. 126 F.3d at 264-265, 31 BRBS at 125(CRT); *see also Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge credited the testimony and labor market surveys of William Kay, employer=s vocational expert. Although Mr. Kay identified numerous employment opportunities that he considered to be available and within claimant=s restrictions, the administrative law judge concluded that only three of these identified employment opportunities, specifically cashier positions at two Food Lion

locations and an attendant position with Waste Industries Convenience Center, were sufficient to meet employer=s burden of establishing the availability of suitable alternate employment. *See* Decision and Order at 8 B 11; Empl. Exs. 5, 6. In rendering this determination, the administrative law judge found that these positions were approved by Dr. Holm, and that Mr. Kay testified that the Food Lion stores would work to accommodate an employee=s physical restrictions. As the administrative law judge=s finding that employer established the availability of suitable alternate employment based upon the testimony of Mr. Kay and Dr. Holm is rational and is supported by substantial evidence, it is affirmed.[1] *See Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Claimant next challenges the administrative law judge=s determination that claimant did not demonstrate due diligence in attempting to secure employment following his layoff from light-duty employment with employer. Specifically, claimant alleges that the administrative law judge did not give reasonable consideration to his participation in the North Carolina Unemployment Commission=s job search program, which required claimant to contact between two and three employers per week in order to qualify for unemployment benefits from the state of North Carolina. In support of his position that he diligently but unsuccessfully sought employment, claimant submitted into evidence a copy of the notebook in which he listed the approximately seventy names and addresses of prospective employers that he allegedly contacted, along with the dates that the contact was made. *See* Clt. Ex. 3. Claimant also alleges that he contacted one of the Food Lion locations identified by employer, but was not offered employment by that store.

In addressing claimant=s evidence on this issue, the administrative law judge stated that a diligent job search requires more than merely making contact with local businesses, and that the claimant in the instant case merely did the Aminimum necessary to qualify for unemployment compensation@ from the state of North Carolina. Decision and Order at 12. After further determining that a claimant should seek out prospective employers who are

[1] We note that claimant, in his brief on appeal, references employer=s failure to assist him in acquiring work post-layoff. *See* Clt=s brief at 4, 12. Employer, however, need not assist a claimant in finding other employment post-injury. *See Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042, 14 BRBS 156, 164-165 (5th Cir. 1981). Moreover, in this case, the evidence of record contains a letter from claimant=s counsel to employer=s vocational counselor prohibiting the latter individual from contacting claimant. *See* Empl. Ex. 8.

actually hiring, determine whether those employers offer work that is within his restrictions, and then pursue those positions which become available, the administrative law judge concluded that claimant did not conduct a reasonable and diligent job search; accordingly, the administrative law judge denied claimant=s claim for ongoing total disability compensation. *Id.* For the reasons that follow, we hold that the administrative law judge=s finding on this issue cannot be affirmed.

Once an employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that he remains totally disabled if he demonstrates that he diligently tried and was unable to secure employment. In *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, described claimant=s burden in this regard as one of A>establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job 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,=@ quoting *Turner,* 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981)(emphasis in original). Moreover, while a claimant must diligently seek appropriate employment, *see Tann*, 841 F.2d 540, 21 BRBS 10(CRT), the administrative law judge must make specific findings regarding the nature and sufficiency of claimant=s alleged efforts in order to determine whether claimant did in fact diligent try, without success, to find another job. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991).

In the instant case, the administrative law judge concluded that claimant did not diligently seek employment following his layoff by employer based solely on what he deemed to be claimant=s general inquiry with local businesses regarding whether or not those businesses were hiring. Decision and Order at 12. An administrative law judge=s inquiry into this issue, however, requires a broader analysis regarding the nature and sufficiency of claimant=s employment efforts. Specifically, the administrative law judge must address the evidence and discuss the particular jobs relied upon by claimant in order to determine whether claimant was genuinely seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *See Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT). *See also Palombo,* 937 F.2d at 74, 25 BRBS at 8(CRT)(claimant is not required to show he sought the identical jobs employer relied upon). Employer in this case identified three specific employment opportunities for claimant, two as a cashier and one as an attendant. Claimant avers that his employment search included one of the specific Food Lion locations identified by employer, an assertion which was not specifically discussed.[2] In addition, claimant testified that he unsuccessfully sought employment with approximately seventy employers, and he provided a

[2] If claimant unsuccessfully attempted to gain employment with one of the specific employers identified by employer, the administrative law judge must consider whether that position was actually available. *See Hooe*, 21 BRBS 258.

notebook listing those employers. In rejecting this evidence, the administrative law judge did not examine any of the jobs with specificity. Moreover, the administrative law judge=s requirement that claimant seek out prospective employers who are actually hiring imposes an additional limitation which is not determinative of claimant=s diligence. If a claimant contacts numerous employers and none are hiring, that is probative evidence regarding the availability of jobs in the local market. Moreover, in order to locate employers who are actually hiring, an employee must first contact a business, and then take reasonable measures to pursue available jobs. Since the administrative law judge did not provide sufficient reasons for rejecting claimant=s evidence, he must reconsider it on remand, as well as contrary evidence offered by employer. In this regard, employer=s vocational counselor testified, and claimant conceded, that claimant did not file an application for employment with many of the employers that he contacted.[3]

Thus, as the administrative law judge did not fully consider the evidence of record regarding the sufficiency of claimant=s efforts to secure employment, we vacate the administrative law judge=s determination that claimant did not conduct a reasonable and diligent job search, and we remand this case for the administrative law judge to address the totality of the evidence on this issue. On remand, the administrative law judge must make specific findings regarding the jobs identified in the record in order to determine whether claimant diligently attempted to secure alternate employment within the compass of the employment opportunities established by the employer. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT).

[3] The relevancy of whether or not an application was filed with employers who either were not hiring or who had no positions available within claimant=s physical restrictions should be considered by the administrative law judge.

Accordingly, the administrative law judge=s determination that claimant did not diligently seek employment following his layoff by employer is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge 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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PETER A. GABAUER, Jr.
Administrative Appeals Judge