BRB Nos. 02-0211
and 02-0211A

BARBARA STUDWELL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Sept. 30, 2002
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Chanda W. Stepney (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (2000-LHC-2468) of Administrative Law Judge Richard K. Malamphy 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 if they 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 March 31, 1998, claimant sustained a work-related, left knee injury. Her treating

physician, Dr. Phillips, drained fluid from her knee and imposed work restrictions. Employer provided claimant with a light duty position in the cleaning department, but subsequently transferred her to the painting department. Claimant testified that employer laid her off on September 23, 1998, because Dr. Phillips's additional work restrictions precluded her from performing her painting duties. Inasmuch as employer had no other light duty positions available to claimant, employer voluntarily paid claimant temporary total disability benefits from September 23, 1998 through April 11, 1999. Employer terminated these benefits on the basis that claimant declined an offer of a suitable light duty position at its facility. Claimant worked at employer's facility in a light duty capacity from May 3, 1999 through August 24, 1999, after which time employer resumed payment of temporary total disability benefits. From November 8, 1999, through January 2, 2000, employer paid claimant temporary partial disability benefits based on the wages claimant would have earned had she accepted a job with another employer as a home care companion. Claimant filed a claim for temporary total disability benefits from April 12, 1999 through May 2, 1999 and from November 8, 1999 through January 2, 2000. At the time of the hearing on March 12, 2001, claimant was working for employer.

In his Decision and Order, the administrative law judge found that claimant established her *prima facie* case of total disability and that employer did not establish the availability of suitable alternate employment from April 12, 1999 through May 2, 1999. The administrative law judge therefore awarded claimant temporary total disability benefits for this period. The administrative law judge found, however, that employer established suitable alternate employment from November 8, 1999 through January 2, 2000, based on the home care position with Personal Touch. Thus, the administrative law judge found that claimant is entitled to the temporary partial disability benefits which employer paid for the period from November 8, 1999 through January 2, 2000, based on the wages claimant would have earned in full-time employment in a position as a home health companion. *See* CX 5b; EX 3.

On appeal, employer challenges the administrative law judge's finding that it did not establish suitable alternate employment from April 12, 1999 through May 2, 1999. Claimant responds, urging affirmance of the award of temporary total disability benefits for this period. In her cross-appeal, claimant challenges the administrative law judge's finding that employer established suitable alternate employment from November 8, 1999 through January 2, 2000. Employer responds, urging affirmance.

Where, as here, claimant is unable to perform her usual pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment opportunities that are available to claimant in the local community which, considering her age, education, vocational history and physical limitations, she is capable of performing and which she could realistically secure if she diligently tried. *See Trans-State Dredging v.*

Benefits Review Board, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may meet its burden of establishing suitable alternate employment by offering claimant a necessary job which she can perform within its own facility. *See 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).

Employer contends that the administrative law judge erred in finding it did not establish suitable alternate employment from April 12, 1999 through May 12, 1999 by its offer of a light duty position within claimant's work restrictions at its facility. Additionally, employer argues that it established that suitable light duty work was available for claimant during the relevant period, because she obtained a light duty position at employer's facility on May 3, 1999, when she reported for work. Thus, employer argues that claimant would have obtained an appropriate light duty position on April 12, 1999, had she reported as employer instructed.

We reject employer's contentions. Contrary to employer's assertion, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available to and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). In ascertaining the suitability of a job the administrative law judge must compare the duties of the positions identified with the claimant's restrictions and capabilities. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Merely alleging that such work is available will not suffice.[1] *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 84(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). In this case, the administrative law judge found that employer contacted claimant on April 12, 1999 to notify her of the availability of light duty work at its facility within her restrictions, but that this offer was too vague to satisfy employer's burden of establishing suitable alternate employment. Decision and

[1]Employer cites *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), for the proposition that it need not establish the duties of a job it contends is suitable for claimant. The Fourth Circuit held in *Moore* that employer need not contact prospective employers to obtain the duties and physical requirements of identified job openings, but may rely on standard industry definitions, such as the *Dictionary of Occupational Titles*, to supply the jobs' qualifications. *Moore* does not state that employer can merely allege that a suitable job is available. In this case, employer supplied neither the actual requirements of any job nor any standard industry definitions.

Order at 8. The administrative law judge stated that he found no evidence in the record that claimant could perform the purported light duty position considering her restrictions, as employer did not establish the nature of the employment claimant would have performed had she reported to work. *Id.* Indeed, employer's evidence does not establish the specific job that employer would have assigned claimant if she had reported for work on April 12. While employer argues on appeal that claimant would have been assigned the duties and position which she was ultimately assigned and began performing on May 3, 1999, employer did not introduce any testimony or documentary evidence to establish this fact. Ms. Mallory, one of employer's workers' compensation case managers, had no personal knowledge of the job claimant would have been assigned had she reported for work on April 12, 1999, nor did Ms. Mallory possess any business records from employer which would have established the offered position. Tr. at 63-64. Ms. Mallory testified only generally about the numerous vacant light duty positions which occurred at employer's facility in this time period due to an ongoing labor strike against employer. Tr. at 62. Mr. Hall, a nurse in employer's clinic, testified on cross-examination, that he made a notation on claimant's chart that claimant was to return to work, but he had no idea what light duty work was available on April 12, 1999. Tr. at 70; CX 2c. Mr. Hall testified that the only thing that he could state on the subject was that the supervisor and general foreman were to find claimant a job within her restrictions. Tr. at 78. Employer did not introduce any evidence from a supervisor or foreman regarding the April 12, 1999 position.[2] Consequently, substantial evidence supports the administrative law judge's conclusion that employer did not establish suitable alternate employment at its facility from April 12 through May 2, 1999, and we affirm the consequent award of total disability benefits for this period.[3] *See generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001).

[2]Claimant testified regarding employer's practice of having her report to the clinic and remain, often for hours, while employer unsuccessfully attempted to locate light duty work which she could perform. She also testified to the times that she was instructed to report to a work assignment only to be "passed out" upon arriving, because the department had no work within her restrictions available when she arrived. Tr. at 25.

[3]The fact that claimant did not report to employer's facility on April 12, 1999, is not dispositive as to the issue of whether employer met its burden of establishing that it actually had a specific light duty position available to claimant on April 12, 1999 through May 3, 1999, as claimant's burden to seek work in a diligent manner does not arise until employer establishes suitable alternate employment. *See 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); *Harrison v. Todd Shipyards Corp.*, 21 BRBS 339 (1988).

In her cross-appeal, claimant contends that the administrative law judge erred in denying temporary total disability benefits from November 8, 1999 through January 2, 2000. Specifically, claimant contends that the administrative law judge erred in finding suitable the home companion job with Personal Touch which was offered to claimant. We reject claimant's contention. The administrative law judge acknowledged that some of the requirements of the home companion position listed on the written job description exceeded claimant's restrictions. Decision and Order at 10; EX 3. Nonetheless, the administrative law judge credited the testimony of Denise Barnhart, claimant's vocational case manager, that the company agreed to accommodate claimant's physical restrictions. Tr. at 53, 56-58. Moreover, Ms. Barnhart was aware that claimant does not drive, and she testified that claimant would be sent only to homes she could reach by public transportation and would not have to run errands during the day. Tr. at 57-58. The Board is not empowered to reweigh the evidence, and we cannot say that the administrative law judge's decision to credit the testimony of Ms. Barnhart over the written job requirements is irrational. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer established suitable alternate employment by virtue of the Personal Touch home companion position, and the consequent denial of temporary total disability benefits for the period between November 8, 1999 and January 2, 2000.[4] *See Shiver v. United States Marine Corps, Marine Base Exchange*, 23 BRBS 246 (1990).

[4]Claimant does not contest the administrative law judge's finding that she did not diligently seek work during this period.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge