BRB No. 96-0665

HERMAN GOGGINS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Mark K. Eckels and E. Robert Williams (Boyd & Jenerette, P.A.), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (94-LHC-2118) of Administrative Law Judge Frederick D. Neusner awarding 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On February 4, 1994, claimant fractured the tip of his left thumb during the course of his employment for employer. Employer voluntarily paid temporary total disability benefits to claimant for the period of February 5 to February 28, 1994. 33 U.S.C. §908(b). In his Decision and Order, the administrative law judge, after noting that the sole issue before him was the nature and extent of claimant's disability from February 28, 1994 to April 14, 1994, found that claimant established a *prima facie* case of total disability, and that employer failed to establish the availability of suitable alternate employment during this period. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from February 5, 1994 through April 15, 1994.

On appeal, employer challenges the administrative law judge's award of temporary total disability compensation to claimant. Claimant has not responded to this appeal.

Employer initially challenges the administrative law judge's determination that claimant was incapable of resuming his usual employment duties with employer during the period February 28, 1994 to April 15, 1994. It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In the instant case, claimant's work duties routinely included driving winches and other motorized loading equipment on and about the dock, driving automobiles out of cargo vessels, latching containers, and carrying loose cargo as required by employer. *See* Decision and Order at 2. In finding that claimant had established a *prima facie* case of total disability, the administrative law judge considered the testimony of claimant and Dr. DePadua. Dr. DePadua, who treated claimant for the fracture at the tip of his left thumb, placed claimant on light duty work from February 28, 1994 to April 15, 1994; Dr. DePadua opined, however, that the degree of claimant's impairment did not prevent claimant from performing work as a driver, container operator, flagman/hatch tender or header. EX 1 at 5-7. Claimant testified that the primary duties of his various longshore jobs require the use of both hands, including driving winches, motorized equipment on or about dock, and automobiles out of the cargo vessels. HT at 14, 25-27. Claimant testified as to his inability to drive vehicles and stated that, contrary to Dr. DePadua's assessment that he is capable of driving, he is incapable, because both hands are needed to latch and unlatch the vehicles before they are moved. Furthermore, claimant emphasized that maneuvering a vehicle inside a cargo vessel is distinctly different from driving on an open road. HT at 28, 31, 39. After comparing Dr. DePadua's opinion with claimant's physical restrictions and the requirements of his usual work set forth in his testimony, *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988), the administrative law judge accorded greater weight to the testimony of claimant that the splint on his left hand precluded him from performing his usual duties because most of his work required the use of both hands. As credible testimony supports the administrative law judge's determination that claimant was incapable of resuming his usual employment duties with employer during the period at issue herein, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability during the period of February 28, 1994 through April 15, 1994. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Employer alternatively contends that the administrative law judge erred in concluding that it had not established the availability of suitable alternate employment, inasmuch as Dr. DePadua, whose opinion is uncontradicted, approved eight employment positions which it had identified as being suitable for claimant. Where, as in the instant case, a claimant is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available

job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs which claimant is capable of performing which are reasonably available in the geographic area where claimant resides. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989) (Lawrence, J., dissenting). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Based upon the testimony of claimant, the administrative law judge in the instant case concluded that employer failed to establish the availability of suitable alternate employment. The administrative law judge relied upon claimant's testimony regarding the specific tasks required of longshore workers, and accorded less weight to Dr. DePadua's opinion that claimant was able to perform the jobs identified by employer because there is no indication that Dr. DePadua had more than a superficial knowledge of the hazards, physical demands, and detailed movements needed to perform any of the jobs he found suitable. Specifically, the administrative law judge reviewed the physical exertion descriptions of the jobs set forth by employer and determined that, because some of the duties involved gripping, climbing, and activities requiring both hands, these jobs were not acceptable inasmuch as they demanded effort beyond claimant's physical capacity. Furthermore, the administrative law judge found persuasive claimant's testimony that he needed two hands to move about the ship, to ascend and descend ladders, to handle latches and blocks, and to safely operate a motor vehicle aboard a ship; the administrative law judge consequently inferred that the risk of riding with a one-handed driver is unreasonable, notwithstanding claimant's physical capacity to manipulate the steering and other controls within the medical restrictions imposed by Dr. DePadua. Inasmuch as claimant's testimony is uncontradicted and questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), we reject employer's contention that the administrative law judge erred in relying on claimant's testimony that he is unable to perform the identified employment positions. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As this credibility determination is neither inherently incredible or patently unreasonable, we affirm the administrative law judge's finding that the positions identified by employer are insufficient to establish the availability of suitable alternate employment, and his consequent award of temporary total disability compensation for the period of February 28, 1994 through April 15, 1994.[1] *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

[1]We note that employer additionally contests the administrative law judge's finding that claimant exercised due diligence to secure a job with employer. Because we have affirmed the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, we need not address employer's contentions whether claimant diligently sought work. *See Manigault*, 22 BRBS at 332.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge