BRB No. 97-1324

WILLIAM D. LARK	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
DEYTEN SHIPYARDS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Thomas M. White (Steinberg Law Firm), Goose Creek, South Carolina, for claimant.

Elizabeth B. Luzuriaga (Young, Clement, Rivers & Tisdale, L.L.P), Charleston, South Carolina, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration of Administrative Law Judge Thomas M. Burke 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 April 5, 1993, claimant, a shipfitter welder, injured his back while working for employer. After undergoing L3-L4 fusion surgery with insertion of pedicle screws bilaterally on October 6, 1993, and a second surgical procedure to remove the screws on October 13, 1993, claimant returned to work for employer in a light duty capacity on February 13, 1994. Thereafter, the shipyard reassigned claimant to a permanent light duty position as a modified tool room attendant. Employer voluntarily paid claimant temporary total and temporary partial disability compensation for various periods. Claimant sought additional temporary total and permanent total disability compensation, alleging that the tool room attendant job which employer provided at its facility exceeded his restrictions, and that he continued to perform this job in pain and only through extraordinary effort because he needed to work to support his family.[1]

After noting that it was undisputed that claimant could not perform his usual work, the administrative law judge found that the modified tool room attendant position did not constitute suitable alternate employment.[2] The administrative law

[1]The parties stipulated that claimant reached maximum medical improvement on December 28, 1995.

[2]Claimant's restrictions are not in dispute. Dr. Aymond, the doctor who performed claimant's surgery opined that claimant was restricted to limited duty work involving no lifting greater than 15 lbs, and no repeated, bending lifting or twisting, which allowed for alternate sitting and standing at will. Dr. Schimenti, a consultant in neurology medical disability assessment, imposed essentially the same restrictions

judge determined, however, that as claimant had actually been earning his full wages, although working outside his restrictions and at the cost of excessive pain, employer should not be required to pay claimant total disability compensation in addition to those wages. Accordingly, he held that claimant's award of permanent total disability compensation was to commence as of the time that he ceased working as a tool room attendant. Employer's motion for reconsideration was denied by Order dated May 6, 1997.

---

but indicated that claimant should avoid more than occasional bending and twisting activities, and stressed that he be allowed to alternate sitting and standing. Dr. Brillant opined that claimant is limited to sedentary work within the permanent restrictions imposed by Dr. Aymond.

On appeal, employer argues that the administrative law judge erred in awarding claimant permanent total disability compensation because it provided claimant with a suitable light duty job as a modified tool room attendant at its facility, where claimant consistently earned higher wages than he had pre-injury and performed substantial overtime. In addition, employer argues that in entering a prospective award which was to commence as of the time claimant stopped working as a tool room attendant, the administrative law judge violated its procedural due process right to a fair hearing regarding other suitable alternate employment available on the open market or at its facility should claimant actually cease working. In this regard, employer avers that because the administrative law judge could not know claimant's medical condition or the employment opportunities available to him in a future market, the prospective award is speculative and should be reversed. Finally, employer contends that the administrative law judge erred in finding that claimant's average weekly wage was $499.59 inasmuch as the parties stipulated prior to the hearing that the applicable compensation rate was $312.11 premised on an average weekly wage of $468.17, *see* ALJX-1; it asks that the Board modify the administrative law judge's Decisions to properly reflect the stipulated $468.17 figure. Claimant responds, urging affirmance.

Where, as here, a claimant is unable to perform his usual work duties, the burden shifts to employer to establish the availability of suitable alternate employment which the claimant is capable of performing. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988). Employer can meet this burden by providing claimant with a suitable job performing necessary work at its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996).

Employer initially argues on appeal that the administrative law judge erred in awarding claimant permanent total disability compensation because it met its burden of establishing the availability of suitable alternate employment by providing him with a suitable job as a tool room attendant performing necessary work at its facility which he had successfully performed for a year and a half as of the time of the hearing while earning approximately $200 more per week than he had earned pre-injury.[3] We reject this contention. In concluding that the modified tool attendant job was not suitable, the administrative law judge specifically considered and rejected

[3]Employer argues that as the work at its facility was necessary, the administrative law judge erred in finding it was sheltered employment. However, as the administrative law judge did not determine that the tool room attendant job was sheltered employment, we need not address employer's argument in this regard that the job involved necessary work.

employer's contention that any work that claimant performed outside of his physical restrictions was done voluntarily, as employer had instructed claimant to only perform work within his physical restrictions and to report any problems to his supervisors, and it had taken various appropriate corrective actions when violations of claimant's lifting restrictions were brought to its attention in the May 1996 South Carolina worker's compensation proceeding.

In finding that despite employer's efforts to accommodate claimant's restrictions the tool attendant job it provided was not suitable for claimant, the administrative law judge specifically considered the testimony of Mr. Cain, employer's safety manager. Upon considering this testimony, however, he determined that although employer could likely accommodate claimant's lifting restrictions through the various procedures outlined by Mr. Cain whereby supervisors or other workers would perform certain functions, other demands of the job still precluded employer from relying on it to meet its burden of establishing suitable alternate employment. Specifically, after noting that claimant's testimony that he is able to stand for only about 15 to 20 minutes without experiencing severe back pain was corroborated by the opinions of Drs. Brilliant, Schimenti, and Aymond, CXS 1, 2, 4, the administrative law judge credited this testimony. Based on claimant's testimony and Mr. Cain's concession that the tool room attendant cannot sit while waiting on workers, the administrative law judge found that the tool room attendant position was not suitable as it did not allow for claimant to alternate sitting and standing at will. The administrative law judge further determined that although claimant might not have to lift over 15 pounds, he nonetheless provided credible testimony reflecting that he must continually twist, stoop and squat to retrieve tools, and must drop to his knees to retrieve an object from the floor. Claimant's credible testimony that at times he must stand for two hours while checking out tools to people standing in line and perform other activities in violation of his restrictions in order to carry out his job responsibilities, in conjunction with Mr. Cain's concession that the tool room attendant cannot sit while working, provide substantial evidence to support the administrative law judge's finding that the tool room attendant position provided by employer was not suitable. Inasmuch as employer has failed to establish any reversible error made by the administrative law judge in evaluating the record evidence relevant to this issue and making credibility determinations, we affirm this determination. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).[4] As claimant established a *prima facie* case of total disability and

[4]Inasmuch as we affirm the administrative law judge's finding that the tool room attendant job at employer's facility did not constitute suitable alternate employment, we need not address employer's argument that because claimed earned higher wages performing this job than he did pre-injury, claimant failed to

employer failed to demonstrate the availability of suitable alternate employment, the administrative law judge's award of permanent total disability compensation is affirmed.[5] *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer's argument that the administrative law judge's prospective award effectively deprives it of an opportunity for a fair hearing regarding other suitable alternate employment available on the open market or at its facility should claimant actually become disabled is also rejected. While the prospective award entered by the administrative law judge in this case is unusual, claimant has not appealed the administrative law judge's finding that he is not entitled to benefits while working and employer is not adversely affected by any delay in its liability commencing.[6] So long

---

establish a loss in his wage-earning capacity.

[5]We also reject employer's argument that the facts in the present case are indistinguishable from those in *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). In *Darby,* the United States Court of Appeals for the Fifth Circuit affirmed the Board's decision that claimant's post-injury assignment to a modified joiner position within employer's facility satisfied employer's burden of showing the availability of suitable alternate employment. In *Darby,* claimant was granted wide latitude to determine his physical capacity and had been instructed to report any conflicts between an assigned job task and his work restrictions to his supervisors. In the present case, the testimony of employer's safety officer, Mr. Cain, establishes that in light of the standing required, the tool room attendant job cannot be performed without violating claimant's restrictions. Moreover, in the present case, unlike *Darby*, the administrative law judge credited claimant's testimony that despite employer's purported willingness to accommodate claimant's restrictions, he was continuously required to work outside of his restrictions in carrying out his job responsibilities.

[6]Where claimant is working post-injury, he may nonetheless be entitled to disability benefits regardless of his actual earnings. A finding that claimant is working in pain and outside his medical restrictions can provide a basis for a permanent partial disability award based on a loss in wage-earning capacity despite higher actual earnings, as such earnings are not determinative of wage-earning capacity. *See Container Stevedore Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Moreover, if claimant is working only due to extraordinary effort or the beneficence of his employer, he may receive total disability benefits while working. *See Argonaut Ins. Co. v. Patterson,* 846 F.2d 714, 21 BRBS 51 (CRT)(11th Cir. 1988); *Haughton Elevator Co. v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978).

as claimant works, employer is not liable for benefits. Only after claimant stops working will the award of permanent total disability compensation commence, and at that time, by virtue of the change in claimant's economic condition, employer may introduce evidence of suitable alternate employment via a modification proceeding under 33 U.S.C. §922. *See generally Metropolitan Stevedore Co. v. Rambo*, 525 U.S. 291, 30 BRBS 1 (CRT)(1995).

Finally, we address employer's arguments regarding the applicable average weekly wage. Employer correctly argues that stipulations which are accepted by the administrative law judge are binding on the parties that make them. *See generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT)(5th Cir. 1989),*vacated in part on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*). Nonetheless, while employer urges that we modify the administrative law judge's Decision and Order consistent with the parties' stipulations in the present case to reflect an average weekly wage of $468.17, we decline to do so because the parties' stipulations are internally inconsistent. In this regard, Number 13 of the parties' stipulations lists the average weekly wage as $499.59, the figure which the administrative law judge utilized in making his award of benefits and which claimant argues in his response brief was properly applied because it coincides with the average weekly wage determination made in the South Carolina proceeding, EX-10. The record further reflects, however, that at the hearing, Tr. at 12-14, and in Number 11 of the parties' stipulations, the parties also agreed that the applicable compensation rate was $312.11, a figure which coincides with the $468.17 average weekly wage figure which employer argues should be applied on appeal.[7] In light of the ambiguity inherent in the parties' stipulations, we vacate the administrative law judge's average weekly wage determination and remand for him to reconsider this issue, resolving the conflict in the parties' stipulations.

[7]We note that employer has attached a letter from the Department of Labor to its Petition for Review, which employer argues supports its position regarding the applicable average weekly wage. The Board, however, may not consider this document as it has no *de novo* review authority, and may only consider evidence which has been admitted into the formal record by the administrative law judge. *See Williams v. Hunt Shipyards, Geosource, Inc.,* 17 BRBS 32 (1985). On remand, however, the administrative law judge may wish to reopen the record for introduction of this document.

Accordingly, the administrative law judge's average weekly wage finding is vacated and the case is remanded for additional consideration of this issue consistent with this opinion. In all other respects, his Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge