

BRB No. 01-0359

DENNIS J. DEDMON)	
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Claimant-Petitioner)	
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NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>Dec. 5, 2001</u>
AND DRY DOCK COMPANY)	
)	
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.

Chandra L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-2047) 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).

Claimant, while working for employer as a sheetmetal specialist, suffered an injury to

his left knee on September 10, 1998. Following surgery, he was released to light duty and returned to work in employer's tool room on January 4, 1999.¹ Claimant thereafter sought temporary total disability compensation for the period of January 4, 1999 to August 6, 1999.

In his decision, the administrative law judge found that claimant's job in employer's tool room did not constitute sheltered employment and that, thus, employer established the availability of suitable alternate employment by placing claimant in that job in its facility. Accordingly, the administrative law judge denied the benefits sought by claimant.

Claimant now appeals, challenging the administrative law judge's finding that his post-injury employment in employer's tool room did not constitute sheltered employment. Specifically, while acknowledging that he was physically capable of performing the duties required of him while he was assigned to employer's tool room, claimant avers that his position was unnecessary and that, accordingly, his work in the tool room constituted sheltered employment. Employer responds, urging affirmance.

Where, as in the instant case, it is uncontested that claimant 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 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*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer can meet this burden by offering claimant a position in its facility, including a light-duty job. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). In this regard, the Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid even if he cannot do the work and which is unnecessary; such employment is insufficient to constitute suitable alternate employment. *See Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997).

¹It is uncontested that claimant, as a result of his post-injury physical restrictions, is incapable of performing the usual employment duties of a sheetmetal specialist.

After careful review of the administrative law judge's Decision and Order, we hold that his determination that the light duty position in employer's tool room offered by employer and performed by claimant was not sheltered employment is rational and supported by substantial evidence. The facts regarding the operation of employer's tool room are not in dispute. Employer has historically staffed its tool room with three employees; in the absence of any one of the assigned employees, employer regularly assigned shipyard workers to its tool room on a temporary basis. Tool room workers distribute and collect equipment and supplies from employer's workers; additionally, the employees assigned to employer's tool room order, unload, inventory and store supplies. *See* EX 16. Although the tool room is busiest early in the morning and in the evening, *i.e.*, at the start and end of a shift, when workers pick up or return equipment, shipyard workers often return to the tool room for various items during the course of the work day.² HT at 28-29. While conceding that the position in employer's tool room is within his physical capabilities and that the work that he performs in the tool room is necessary to employer's operations, claimant argues that the position itself is unnecessary, or sheltered, since the tasks necessary for the smooth operation of the tool room could easily be handled by two workers rather than the three employees assigned by employer. Specifically, claimant alleges that although the tool room was busy in the morning and evening, there were periods of time during the day during which the employees had nothing to do to occupy their time. HT at 56.

²Mr. Brown, claimant's general foreman, testified that before the strike which commenced on April 5, 1999, the tool room serviced approximately 140 workers per day. HT at 131.

In support of its decision to regularly assign three of its employees to its tool room, employer presented the testimony of Mr. Moore, an employee permanently assigned to the tool room by employer for the previous eight years, who testified that the availability of three workers assured the smooth and prompt operation of the facility, and that even during non-peak hours there was sufficient work available to keep the tool room workers busy.³ EX 16. While conceding that two individuals could have operated the tool room, Mr. Moore testified that the tool room ran more efficiently and faster with three individuals working there,⁴ HT at 110-111; moreover, during the absence of one or more of the assigned employees, Mr. Moore stated that it was necessary for a worker to be taken off a repair job to assist in the tool room since the need of tools and supplies by employer's workers during the course of a work day was unpredictable. HT at 110-111. Similarly, Mr. Brown, claimant's general foreman, testified that it was critical to fully staff the tool room to prevent a bottleneck in the morning that would delay the start of work on the ships. EX 18. In this regard, Mr. Brown specifically stated that his superior had complained that the tool room operated too slowly when it was staffed by only two employees. Lastly, Ms. Eley and Ms. Heckstall, claimant's co-workers who worked with him in the tool room at various points in time,⁵ as well as Mr. Hassell, another co-worker, all testified that the assignment of three workers in the tool room resulted in a faster and more efficient operation. HT at 76; HT at 90; CX 5.

In the instant case, the administrative law judge considered all of the evidence of record and concluded that the tool room positions were necessary to employer and that the determination of the number of employees necessary to perform the work there was a

³Mr. Moore testified that when not busy assigning or accepting tools and supplies, workers were supposed to order supplies, unload and organize inventory, sort nuts and bolts and clean the work area. EX 16; *see also* HT at 52.

⁴Mr. Moore testified that he prefers three workers in the tool room: one to take an order or receive tools back, one to get the tool or put it back, and the third to keep inventory; thus, three tool room workers prevent shipyard workers' from being delayed in starting their jobs should one of the tool room employees be presented with a long list of needed supplies or if he or she is required to find a forklift driver to move supplies. EX 16.

⁵Ms. Eley was assigned to the tool room when claimant commenced employment there; Ms. Heckstall replaced Ms. Eley on March 30, 1999. Both of these employees testified that, although two workers were needed to operate the tool room, three workers were needed if employer's shipyard workers requested supplies and during the termination of a shift. Regarding the three employees assigned to the tool room, we note that claimant does not explain why, upon the departure of Ms. Eley and the subsequent arrival of Ms. Heckstall, he should be considered the "third" rather than "second" employee assigned to the tool room.

management decision; specifically, the administrative law judge determined that employer had staffed the tool room for many years, that the tool room must remain open when workers work on a shift, and that the position was not created for claimant but, rather, had been staffed by various workers, and would be filled by another employee if claimant was not available. Lastly, the administrative law judge found that the positions in employer's tool room were at times filled by taking workers from their usual ship-related work, thus demonstrating the need to man the tool room at all times. Therefore, the administrative law judge concluded that the positions in employers tool room were not sheltered employment. Inasmuch as these findings are supported by substantial evidence, are rational, and are in accordance with law, *see O'Keeffe*, 380 U.S. 359, we affirm the administrative law judge's finding that claimant's post-injury job in employer's tool room was not sheltered employment, and his consequent finding that claimant is not temporarily totally disabled. *See Buckland*, 32 BRBS 99; *Peele*, 20 BRBS 133.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge