BRB No. 98-658

RICKY G. ADDISON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-LHC-2505) of Administrative Law Judge David W. Di Nardi 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 injured both wrists on November 2, 1992, while working as a sheet metal worker for employer, and subsequently underwent surgery for carpal tunnel syndrome. Employer voluntarily paid claimant various periods of temporary total

disability benefits as well as permanent partial disability benefits for a five percent impairment to each wrist. On August 9, 1994, claimant's treating physician, Dr. Gwathmey, imposed permanent restrictions on claimant of lifting no more than 25 pounds, no use of pneumatic tools, and no heavy continuous use of his hands. As employer could not provide claimant with light duty work within these restrictions, claimant was laid off from employer on September 23, 1994, and has never returned to work. After finding that claimant established his *prima facie* case of total disability, the administrative law judge found that employer established the availability of suitable alternate employment and that claimant did not establish diligence in securing alternate employment. The administrative law judge thus found claimant limited to benefits under the schedule for a five percent permanent partial impairment to each hand. Consequently, the administrative law judge denied claimant additional disability benefits.

On appeal, claimant challenges the administrative law judge's denial of additional disability benefits. Employer responds, urging affirmance of the administrative law judge's decision.

We first address claimant's challenge to the administrative law judge's finding that employer established suitable alternate employment. Once, as here, claimant establishes an inability to perform his longshore employment because of a job-related injury, the burden shifts to employer to establish the availability of other jobs that claimant could perform, *i.e.,* suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). The administrative law judge found that employer established suitable alternate employment based on Mr. Klein's labor market survey which identified ten positions that were available to claimant and that he could perform. Decision and Order at 16-21; Emp. Ex. 7. Arguably, seven of the ten positions do not constitute suitable alternate employment.[1]

[1]Although the administrative law judge found that all ten positions identified by Mr. Klein constituted suitable alternate employment, seven of the ten positions including interviewer, security guard, cashier, maintenance person, marine dispatcher, and

Any error in the administrative law judge's identification of the above seven positions as suitable alternate employment, however, is harmless as Mr. Klein identified three remaining positions which Dr. Gwathmey approved for claimant: a dispatcher at Jack's 24 Hour Wrecker Service, a food preparation person at Community Alternatives, and a food service person at Chesapeake Service Systems. Emp. Ex. 7. Although Ms. Edward's opinion regarding the suitability of each of these jobs differed from that of Mr. Klein's opinion, Mr. Klein stated that claimant would be considered for these jobs, which were within his work restrictions and appropriate for one with his vocational and educational background. Cl. Exs. 13 at 10, 59, 72, 74-77, 14 at 21-24; *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). As the administrative law judge acted within his discretion in crediting Mr. Klein's opinion over the opinion of Ms. Edwards that claimant is totally disabled and cannot return to any kind of work, and as Mr. Klein and Dr. Gwathmey opined that these three jobs are suitable for claimant, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as it is supported by substantial evidence. *Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting).

We also affirm the administrative law judge's finding that claimant failed to establish diligence in pursuing alternate employment. In order to defeat employer's showing of suitable alternate employment, claimant must establish that he diligently pursued alternate employment opportunities but was unable to secure a position. *Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *see also Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). The administrative law judge

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food preparation person at Dam Neck Galley may not be suitable: the interviewer position was withdrawn post-hearing by employer; employer conceded that claimant would not be hired as a security guard due to his drunk driving conviction and the remaining jobs may exceed claimant's physical restrictions. *See Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990); Cl. Exs. 7, 13; Emp. Exs. 7, 8; Emp. Br. at 15 n. 9, 36; Cl. Br. at 45.

rationally found that claimant did not diligently pursue alternate employment as he did not credibly explain why he has been unable to obtain even an interview with most of the firms he has contacted and as he approached his job search negatively. *See generally Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J., dissenting); Decision and Order at 6, 20; Cl. Ex. 9; Tr. at 37-43, 45-51.

Lastly, we affirm the administrative law judge's award of permanent partial disability benefits for a five percent impairment to each hand and hence his denial of additional permanent partial disability benefits to claimant. Contrary to claimant's contention, he is limited to a recovery based on his medical impairment and any loss in wage-earning capacity is not factored into his award under the schedule. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15 (CRT)(4th Cir. 1998).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge