BRB No. 89-3807

WILFRED MADISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
ALABAMA DRY DOCK & SHIPBUILDING CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Madden, III (Madden & Soto), Mobile, Alabama, for claimant.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves), Mobile, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-3414) of Administrative Law Judge A. A. Simpson, Jr. denying 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a boilermaker for employer from 1970 until his injury in February 1986. In May 1985, claimant, while standing on an inclined floor, attempted to lift a steel hatch. He lost his footing and injured his back. Claimant was put on light duty work thereafter. Tr. at 25-27. In February 1986, while still on light duty, claimant swung a sledgehammer while working on a ship and pulled his back. Tr. at 30-32. Claimant has not worked for employer since then, although he has continued to work intermittently as a part-time barber. Dr. Dyas determined that claimant has degenerative disk disease with superimposed chronic lumbosacral strain. Emp. Ex. 10 at 14. He

further determined that claimant has a 10 percent permanent impairment, and he placed claimant on permanent restrictions.[1] Emp. Ex. 10 at 9-11, Ex. 1.

On March 31, 1986, Dr. Dyas informed employer that claimant could return to light duty work until his retirement. On July 25, 1986, employer offered claimant a temporary job as a firewatch supervisor on the naval vessel *Lexington*. Emp. Exs. 5, 21 at 8. Citing a physical inability to perform the required duties, claimant refused the position. Tr. at 35, 55. Employer terminated claimant's temporary total disability benefits and his job, and claimant filed a claim for compensation.

[1]Dr. Dyas prohibited claimant from lifting, stooping, squatting or climbing. Emp. Ex. 10 at 10. He suggested claimant be placed in a job where he could sit or stand as necessary. Emp. Ex. 10 at Ex. 1.

A hearing was held, wherein the parties stipulated that employer paid a total of $4,294.70 in temporary total disability benefits between February 12, 1986 and July 25, 1986, that all medical benefits have been provided for or paid, and that claimant's condition reached maximum medical improvement on August 12, 1986. Decision and Order at 2. The parties disputed the extent of claimant's disability and the applicability of Section 8(f), 33 U.S.C. §908(f). *Id.* The administrative law judge found that claimant's disability had "completely resolved" by July 25, 1986, that claimant had unreasonably rejected employer's offer of alternate employment, and that claimant was not entitled to additional compensation.[2] Decision and Order at 5. Therefore, the administrative law judge denied benefits and declined to discuss the applicability of Section 8(f). *Id.* Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in concluding that employer established the availability of suitable alternate employment. Specifically, claimant contends that the job offered by employer was not suitable and that he did not unreasonably refuse it. Alternatively, claimant challenges the administrative law judge's failure to determine claimant's wage-earning capacity on the open market as the job offered by employer, although it may have been suitable, was only temporary. As another alternative, claimant contends the position offered was so restricted as to constitute sheltered employment. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Once a claimant shows he is unable to return to his usual work, an employer must establish the availability of other jobs claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Id.* Employer may meet its burden by offering claimant a job at its facility specially tailored for injured employees, provided the job is necessary work. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In the instant case, Dr. Dyas determined that claimant is physically incapable of returning to his usual work, and this fact is undisputed. Emp. Ex. 10 at 8-9, 20, Ex. 1. The burden then shifted to employer to establish the availability of suitable alternate employment. Employer notified claimant that the position of firewatch supervisor was available to him at his former wages. In response to a question concerning the duration of the job, Mr. Duke, Director of Insurance, Medical and Safety at employer's facility, estimated that the "particular job was about six or nine months. . . .in duration."[3] Emp. Ex. 21 at 9. The official job description of a firewatch supervisor requires its incumbent to assist the fire marshal in inspecting watch areas and to perform the fire marshal's duties in his

[2]It is uncontradicted that Dr. Dyas determined that claimant has a 10 percent permanent impairment and that his condition reached maximum medical improvement on August 12, 1986. Therefore, the administrative law judge's statement that any disability claimant received from his February 5, 1986 work injury "completely resolved by July 25, 1986" must be read to mean that claimant did not have an economic disability after July 25, 1986.

[3]At the same time, Mr. Duke emphasized that claimant's usual job was intermittent and "discontinuously regular." Emp. Ex. 21 at 9.

absence. Emp. Ex. 5. According to Mr. Duke, this would entail traversing all decks of the ship, including remote areas, crawl spaces, and areas which could be accessed only by a vertical ladder. Emp. Ex. 21 at 21-22. Knowing that claimant could not perform the job as written, employer offered to modify it to meet the requirements set by Dr. Dyas. Particularly, employer offered to limit claimant's duties to keeping records and to examining and distributing the equipment each day. Emp. Ex. 21 at 10-12. Forgoing a trial period, claimant turned down the job as firewatch supervisor stating that, because he was familiar with the duties required and the vessel involved, he felt he could not perform the job. He denied being offered a modified firewatch supervisor position. Tr. at 35.

The administrative law judge credited Mr. Duke's testimony on the issue of the offer of a modified job and determined that claimant unreasonably refused the job. Decision and Order at 5. Although there is no written record of the offer to modify the position, and claimant denied knowledge of the offer, the administrative law judge credited the testimony of Mr. Duke as is within his discretion as trier-of-fact. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). We thus reject claimant's contention regarding the suitability of the modified firewatch supervisor position as the duties of the modified job meet the restrictions prescribed by Dr. Dyas. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. Moreover, we reject claimant's contention that the position is sheltered employment because employer clearly established the necessity of the work through Mr. Duke's testimony that 200 "college kids" were being hired as firewatchers aboard the *Lexington* and needed supervision. *See Darden*, 18 BRBS at 224; *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); Emp. Ex. 21 at 9-10. Therefore, we affirm the finding that this job as modified was suitable given claimant's restrictions.

Claimant also contends that the job offer could not meet employer's burden as it was only a temporary job. Mr. Duke estimated the duration of the modified job to be approximately six to nine months. In finding the job met employer's burden of establishing available suitable alternate employment, the administrative law judge did not consider this testimony regarding the temporary nature of the job. Moreover, the administrative law judge did not discuss whether claimant's self-employment as a part-time barber constitutes suitable alternate employment.[4] *Royce v. Elrich Construction Co.*, 17 BRBS 157, 159 (1985) (Part-time work that a claimant can perform may constitute suitable alternate employment); *Sledge v. Sealand Terminal, Inc.*, 14 BRBS 334, 337 (1981), *after remand*, 16 BRBS 178 (1984) (Self-employment may be considered suitable alternate employment, and income from that self-employment may indicate a claimant's wage-earning capacity provided the income results from the claimant's personal services). *See also Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). Therefore, we vacate the administrative law judge's

[4]Claimant testified he has owned a barber shop for 45 years, but now he only works there part-time and on an irregular basis because it does not pay to keep the shop open full-time. Moreover, he stated he is physically unable to cut more than two heads of hair in a row because of his back condition. Tr. at 37-39. Claimant estimated his earnings as a barber averaged approximately $35-40 per week. *Id.* at 39.

denial of benefits and remand the case to him for further consideration of the issue of suitable alternate employment and for discussion of the issue of claimant's post-injury wage-earning capacity.[5] *See* 33 U.S.C. §908(h). Further, if the administrative law judge awards claimant permanent disability compensation, he must consider employer's entitlement to Section 8(f) relief as that issue was not reached previously.

[5]If necessary, the administrative law judge may reopen the record for the production of additional evidence of suitable alternate employment and calculate claimant's wage-earning capacity based on suitable jobs available on the open market. *See generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991).

Accordingly, the Decision and Order of the administrative law judge is vacated and the case is remanded for further proceedings in accordance with this decision.

SO ORDERED.

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BETTY J. STAGE, Chief
Administrative Appeals Judge

_____
NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge