

KELLY W. HOGG)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN SHIP)	DATE ISSUED: <u>May 24, 2005</u>
SYSTEMS, INCORPORATED)	
AVONDALE INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Additional Compensation Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

R. Scott Iles, Lafayette, Louisiana, for claimant.

Richard S. Vale, Christopher K. LeMieux, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Additional Compensation Benefits (2002-LHC-2607) of Administrative Law Judge Richard D. Mills 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipfitter, injured his lower back on April 12, 2000. Employer voluntarily paid claimant temporary total disability benefits from April 17 to August 31, 2000, and from September 14, 2000, through December 15, 2002, and permanent partial disability benefits from December 16, 2002, to August 24, 2003. Claimant returned to work in September 2000 for three and one-half months. On October 21, 2001, claimant reached maximum medical improvement, and the functional capacities evaluation restricted him to medium work. Claimant was terminated from employment with employer on November 9, 2001.¹ Emp. Ex. 1 at 2, 13, 14. On June 15, 2003, claimant began his post-injury employment as a clerk with a Louisiana state park earning \$6 per hour for 40 hours per week or \$240 per week.

The administrative law judge found that employer established the availability of suitable alternate employment on October 1, 2001, based on two security guard jobs. He further found that claimant did not pursue alternate employment with adequate diligence in 2001 and 2002, but did make some effort to find employment in early 2003. The administrative law judge also found that claimant's post-injury wage-earning capacity is \$300 per week based on the wages of suitable jobs in an August 1, 2003, labor market survey. He awarded claimant ongoing permanent partial disability benefits from October 21, 2001, based on a post-injury wage-earning capacity of \$300 per week.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to total disability benefits up to the point that he found employment. Claimant also contends that the administrative law judge's wage-earning capacity finding is in error. Employer responds in support of the administrative law judge's decision.

Claimant first contends that he is entitled to total disability benefits, as the administrative law judge erred in finding that he did not diligently seek alternate employment opportunities. In order to defeat employer's showing of suitable alternate employment and retain entitlement to total disability benefits, the burden is on claimant to establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by employer to be reasonably attainable and available.² See *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT)(5th Cir. 1981); see also *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2^d Cir. 1991).

¹ Employer's personnel file indicates that claimant cleared payroll on November 9, 2001, and that his last day of work was on November 9, 2000. Emp. 1 at 2, 13, 14. However, claimant testified at the hearing that he believed he received employer's notice of termination around April 2001. Tr. at 54-55.

² Claimant does not contest the administrative law judge's finding that employer established suitable alternate employment.

The administrative law judge found that claimant did not pursue employment with adequate diligence in 2001 and 2002, but did make some effort to find employment in early 2003. We affirm the administrative law judge's finding that claimant did not diligently seek work in 2001 and 2002 as it is supported by claimant's testimony that he did not look for work until 2003 when his compensation benefits were decreased. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); Decision and Order at 7; Tr. at 55-56. Thus, the administrative law judge rationally awarded claimant partial disability benefits from October 2001 through 2002.

However, we cannot affirm the administrative law judge's award of partial disability benefits from January 1 through June 14, 2003. The administrative law judge's findings indicate that claimant may have diligently sought work in 2003, but he did not award claimant total disability benefits at this time. The administrative law judge stated, "Although Claimant thereafter did make some effort to find employment in early 2003 he did not pursue employment with adequate diligence in 2001 and 2002." Decision and Order Denying Additional Compensation Benefits at 7. There is evidence of record regarding claimant's search for employment in 2003, which the administrative law judge did not address. *See Cl. Ex. 1 at 2-4; Tr. at 24-29, 52-53, 58-66.* Thus, we vacate the administrative law judge's denial of total disability benefits for the first five and one-half months of 2003, and we remand the case for findings regarding the nature and sufficiency of claimant's search for alternate employment from January 1 to June 15, 2003. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). On remand, if the administrative law judge finds claimant diligently sought alternate employment prior to June 15, 2003, he must award total disability benefits for the relevant period. *See Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

Claimant also contends that the administrative law judge erred in determining that his current post-injury wage-earning capacity is \$300 per week. Claimant contends that his wage-earning capacity as of June 15, 2003 is best reflected by his current actual earnings.³ An award for permanent partial disability benefits in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Id.*

The administrative law judge found that claimant's post-injury wage-earning capacity is \$300 per week based on suitable jobs employer identified as available as of August 2003.⁴

³ Claimant does not raise any issues concerning the administrative law judge's finding regarding claimant's post-injury wage-earning capacity for the period prior to his obtaining a job on June 15, 2003. *See Cl. br. at 7.*

Emp. Ex. 3 at 2. We cannot affirm this determination, as the administrative law judge did not address whether claimant's actual wages "fairly and reasonably" represent his wage-earning capacity, as is required under Section 8(h). See *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Factors relevant to this inquiry include the employee's physical condition, age, education, industrial history, and any other factors which may affect the claimant's ability to earn wages in his impaired condition. 33 U.S.C. §908(h); see *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988). The party alleging that claimant's actual post-injury earnings do not represent his wage-earning capacity bears the burden of so establishing. See *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); see also *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). If the administrative law judge finds claimant's actual earnings do not fairly and reasonably represent his wage-earning capacity, he may find an alternate amount which does so based on the evidence and relevant factors. *Id.* As the administrative law judge's decision does not contain any discussion of claimant's wage-earning capacity in terms of his actual post-injury earnings, we remand the case for the administrative law judge to reconsider claimant's post-injury wage-earning capacity pursuant to Section 8(h).

⁴ The jobs identified in Ms. Sledge's August 2003 labor market survey were production manager technician at Lifeshare Blood Center paying \$7.50 per hour, customer service/front counter at Weil Cleaners paying \$7.50 to \$8 per hour, and sales associate with Racetrac Petroleum paying \$7 to \$7.50 per hour. Emp. Ex. 3 at 2.

Accordingly, we remand the case for the administrative law judge to make findings regarding whether claimant diligently sought alternate employment opportunities in 2003. The administrative law judge's finding that claimant's post-injury wage-earning capacity is \$300 per week as of June 15, 2003, is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge