BRB No. 98-1591

DONALD HOLLIFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Mary Nelson Morgan and Jeremy Brahim Akel (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Rejection of Claim (98-LHC-1591) of Administrative Law Judge Edward Terhune Miller 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 his back on April 12, 1993, while in the course of his employment as an outside maintenance machinist first class. He was diagnosed with a herniated nucleus pulposus at L5-S1 and L4-5, and a laminectomy was performed on February 9, 1994. Claimant's treating physician opined that claimant reached maximum medical improvement in August 1994, assigned a fifteen percent impairment rating, and released claimant for light duty. Claimant returned to work at employer's facility as a telephone operator on May 16,

1994. Due to a relapse in his condition, claimant underwent another back operation in December of 1994 and reached maximum medical improvement from that procedure on February 6, 1995. Claimant was again released for light duty and his impairment rating was increased to twenty percent. Claimant returned to work at employer's facility in February 1995 and worked in positions as a craft clerk, gate guard, and a telephone operator, all of which paid $7 per hour. Consequently, employer voluntarily paid permanent partial disability benefits based on a residual wage-earning capacity of $280 per week (40 hours x $7 per hour). Claimant was laid off, as part of a general layoff, on June 26, 1995. He sought increased permanent partial disability compensation under the Act, as he alleged that he is not able to earn $7 per hour on the open market.

In his Decision and Order, the administrative law judge found that the jobs claimant performed at employer's facility after returning from surgery were not sheltered employment. The administrative law judge also noted that the labor market survey submitted by employer shows that there were job opportunities available to claimant in the general range of $7 per hour which were within his capabilities in the private sector, and claimant does not contest that he has the capacity to perform these jobs. The administrative law judge found that the general layoff did not generate a requirement that the employer prove the availability of suitable alternate employment at that time, and thus, denied the claim for increased benefits.

Claimant contends on appeal that the administrative law judge erred in finding that employer did not have a continuing obligation to demonstrate suitable alternate employment after a general layoff. In addition, claimant contends that the administrative law judge did not explain his finding that suitable alternate employment is established after the layoff, and requests that the case be remanded for further findings. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, claimant contends that the administrative law judge erred in finding that employer did not have a continuing obligation to establish suitable alternate employment after a general layoff. We agree. Where claimant is laid off from a suitable post-injury job within employer's control, for reasons unrelated to any actions on his part, and he demonstrates that he remains physically unable to perform his pre-injury job, the burden remains with employer to show the availability of new suitable alternate employment, if employer wishes to avoid liability for total disability. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). In the present case, it is undisputed that claimant cannot return to his former employment as an outside maintenance machinist. Thus, we vacate the administrative law judge's finding that claimant's layoff did not "impose any additional burden of proof upon the Employer." Decision and Order at 9.

Although the administrative law judge found that employer's labor market survey was

"immaterial" in this case, he found that it shows the existence of job opportunities available to claimant in the general range of $7 per hour and within his capabilities in the private sector. The positions listed show availability dates from the date of maximum medical improvement from the first surgery to the date of the second surgery, and from the date claimant was laid off to the date of the hearing. *See* Emp. Ex. 4. Evidence of specific job openings available at any time during the critical periods when claimant is medically able to seek work is sufficient to establish the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988)*; Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). Inasmuch as claimant's restrictions did not significantly change after the second surgery, and claimant does not contest that he is physically capable of performing all of the jobs on the labor market survey, we hold that the labor market survey is sufficient to establish the availability of suitable alternate employment after the layoff. *Martiniano*, 23 BRBS at 365.

Moreover, the administrative law judge found that the hourly wage of $7 reasonably reflects claimant's post-injury wage-earning capacity, as he noted that while some of the jobs cited in the labor market survey paid less than $7 per hour, some paid more, which "provides some reassurance that claimant's wages of $7.00 paid by Employer were not extraordinary." Decision and Order at 10. Thus, we affirm the administrative law judge's finding that the hourly wage of $7 per hour reasonably reflects claimant's actual wage-earning capacity as it is rational and supported by substantial evidence. *See generally Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998). Claimant is therefore entitled to no additional disability benefits in excess of the $268.83 per week for permanent partial disability being paid by employer.

Accordingly, the administrative law judge's denial of the claim for increased benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge