BRB Nos. 05-0955
and 05-0955A

KENNETH SZABLEWSKI	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 08/14/2006
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Conrad M. Cutliffe (Cutliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits (2003-LHC-2836) of Administrative Law Judge Colleen A. Geraghty 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a pipefitter for employer from 1989 until September 8, 1995. On September 11, 1995, claimant underwent bilateral knee replacement surgery. Claimant subsequently filed a claim under the Act seeking permanent total disability

compensation as a result of traumatic injuries to both knees; he asserted the injuries were the result of repetitive kneeling, climbing on steel and climbing ladders carrying heavy tools and materials. ALJX 4.

In her Decision and Order, the administrative law judge found that claimant's knee conditions are causally related to his employment with employer, that claimant reached maximum medical improvement on February 25, 1997, that claimant established a *prima facie* case of total disability, and that employer established suitable alternate employment as of May 15, 2003. The administrative law judge then determined that claimant is entitled to compensation for a scheduled 35 percent impairment to each knee; accordingly, the administrative law judge awarded claimant permanent total disability compensation from February 25,1997, to May 15, 2003, and permanent partial disability pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2), of the Act, thereafter.

On appeal, claimant challenges the administrative law judge's suitable alternate employment findings. Claimant also contends that the administrative law judge erred in failing to award him interest on past due compensation. Employer cross-appeals, contending that the administrative law judge should not have awarded claimant total disability compensation during the time claimant was participating in a Department of Labor-sponsored vocational rehabilitation plan.

Where, as in this case, a claimant is incapable of resuming his former employment duties with employer, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to meet this burden, employer must show the availability of realistic job opportunities in the relevant community, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Id.* In addressing this issue, the administrative law judge must compare claimant's physical restrictions and vocational factors with the requirements of the positions identified by employer. *See Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

We initially address employer's appeal challenging the administrative law judge's award of permanent total disability benefits for the period from February 25, 1997, through May 15, 2003. Employer asserts that this award is inconsistent with claimant's enrollment during this time period in an approved vocational program at Three Rivers Community College, seeking an AS degree in Hospital Food Service Management. CXs 6-12, 12-5. It is undisputed, however, that employer presented no evidence of suitable

alternate employment prior to its initial labor market study of May 15, 2003. *See* Decision and Order at 8-9 n.1. Enrollment in an educational program is not evidence of the availability of suitable alternate employment. *See Lorenz v. FMC Corp., Marine & Rail Equip. Div.,* 12 BRBS 592 (1980). Moreover, as employer did not introduce evidence of the availability of suitable alternate employment prior to May 15, 2003, whether claimant was participating in an approved rehabilitation program under *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), during that time is irrelevant. Accordingly, the administrative law judge's award of permanent total disability benefits from February 25, 1997, to May 15, 2003, is affirmed.

In his appeal, claimant challenges the administrative law judge's finding of suitable alternate employment in May 2003. Claimant initially asserts that the administrative law judge erred in relying upon employer's labor market surveys to find suitable alternate employment because the surveys did not take into consideration claimant's lifting restrictions. We disagree. The administrative law judge found that employer established the availability of suitable alternate employment through two labor market surveys prepared for employer which list specific positions suitable for and available to claimant. EXs 4, 9; Decision and Order at 11. She considered and rejected claimant's argument that the May 2004 labor market survey prepared by Sowmya Sundarajan was based on inadequate information regarding claimant's work restrictions. Ms. Sundarajan testified that in preparing the May 2004 labor market survey, she reviewed a prior labor market survey dated May 16, 2003, as well as the medical documentation from Dr. Cambridge, and that the ten positions which she identified for claimant were based on the restrictions listed in Dr. Barnett's report which included a lifting restriction of 5-10 pounds.[1] Tr. at 71-90; EXs 4, 8, 9. Moreover, the administrative law judge specifically considered the restrictions against lifting objects weighing more than five pounds and working in confined spaces when she reviewed the suitability of the positions identified in the labor market surveys. Decision and Order at 10; *see* CX 5 at 18; EX 7 at 11. Thus, contrary to claimant's contention, employer's vocational expert considered claimant's post-injury lifting restrictions when preparing her labor market survey, and the administrative law judge subsequently reviewed the labor market survey in light of those restrictions when considering the suitability of the positions listed. As the credited vocational evidence thus establishes the availability of jobs suitable for claimant, we affirm the administrative law judge's finding on this issue.

Claimant next argues that that the identified position at Foxwoods Casino was not suitable because it was part-time; however, a part-time position can constitute suitable alternate employment. *See Royce v. Erlich Constr. Co.,* 17 BRBS 157 (1985).

[1] The administrative law judge found the following positions listed in the surveys to be suitable for claimant: front desk clerk at Lyme Shore Sports Club, EX 9 at 5; bus attendant/greeter at Foxwood Casino, EXs 4 at 4, 9 at 6; Answering Service Operator at Central Communications, EX 9 at 7.

Claimant's assertion that even if the identified positions are deemed to be suitable, the pay is too low to constitute suitable employment must be rejected since there is no requirement that jobs pay a certain wage. Moreover, in the case of a permanent injury covered by the Act's schedule, 33 U.S.C. §908(c)(1)-(19), as here, once employer establishes the availability of suitable alternate employment, claimant's total disability becomes partial and the degree of loss in wage-earning capacity is irrelevant. In such cases, Section 8(c)(21) does not apply, compensation is limited to that set forth in the schedule, and economic factors are not relevant since payments made under the schedule presume a loss in wage-earning capacity. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915(CRT) (4th Cir. 1998); *Henry v. Geo. Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). Accordingly, claimant's contention in this regard is rejected.

Claimant also argues that since he was undergoing vocational rehabilitation in May 2003, the administrative law judge erred in finding that employer established the availability of suitable alternate employment at that time. In this regard, claimant contends that during the Spring of 2003 he was still being monitored by Mr. Olds under the auspices of the Labor Department's Office of Workers' Compensation Programs with respect to his retraining, that he was taking Algebra, and that he was being tutored twice a week. We reject these contentions of error and affirm the administrative law judge's decision on this issue. Claimant can establish total disability if suitable alternate employment is not reasonably available due to his participation in a DOL-sponsored rehabilitation program. *See Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000). In the instant case, the administrative law judge found that claimant's participation in a vocational rehabilitation program did not meet the standard established in *Abbott*, because claimant's participation varied in extent and because claimant's school records indicate that he did not always maintain a full course load. Decision and Order at 8-9 n.1. As claimant does not dispute the administrative law judge's finding that in May 2003 he was not enrolled in a full-time DOL-sponsored program, and as claimant did not submit any evidence that he was unable to work during the period at issue, we affirm the administrative law judge's decision to deny claimant total disability benefits on this basis during this period of time. *See Kee*, 33 BRBS 221.

Claimant next challenges the administrative law judge's finding that he was not diligent in his job search. Claimant argues that he testified without contradiction that he looked in the newspaper for jobs on a daily basis, that he worked through the career

center at Three River College seeking employment, and that he submitted into evidence a sampling of the applications which he filed with various employers. In this regard, claimant contends that he submitted seven job applications and received at least three rejections in 1993, *see* CX 13, and that he attempted to get additional help through the Department of Labor's Vocational Rehabilitation Office but was rejected and advised to use the local college career placement office. Once employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that he remains totally disabled if he demonstrates that he diligently tried and was unable to secure employment. *Pietrunti*, 119 F.3d at 1041, 31 BRBS at 88(CRT); *Palombo*, 937 F.2d at 73, 25 BRBS at 5-6(CRT); *Trans-State Dredging v. Benefits Review* Board, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). In finding that claimant in this case was not diligent in seeking employment post-injury, the administrative law judge stated:

> The Claimant's testimony regarding his job inquiries external to the labor market survey remain too vague to sustain a finding that he engaged in a diligent job search. Tr. 47-48. . . . [H]e identifies no specific jobs, application dates or contacts. . . . The documentary evidence of record shows that the Claimant did apply to positions listed in the 2003 labor market survey. CX 13. . . . The record also suggests that the Claimant informed his attorney that he submitted resumes to employers . . . but the documents are undated, unsigned, and fail to identify specific individuals the Claimant allegedly spoke with. . . . Moreover, they do not indicate whether the Claimant made any specific contacts or follow up phone calls to these potential employers. . . . The documentary evidence of submitted applications indicates that the Claimant submitted one application for employment every two months. I do not view this rate of submission to represent a sufficiently diligent search for alternative employment. Thus, I find that the Claimant has failed to show that he conducted a diligent job search.

Decision and Order at 12. The administrative law judge properly recognized that it is claimant's burden to establish due diligence; in this instance, based upon her evaluation of claimant's efforts, the administrative law judge concluded that claimant did not meet this burden. Accordingly, the administrative law judge's finding that claimant did not diligently seek employment is affirmed. *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989).

Claimant contends, in the alternative, that the administrative law judge erred in finding that suitable alternate employment was established in May 2003, rather than May 2004, because the administrative law judge determined that the May 2003 labor market survey identified only one position that was suitable for claimant. This argument has merit. Once employer has established the availability of suitable alternate employment, claimant's total disability becomes partial on the date that suitable alternate employment

is shown to have been available. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.).

In the instant case, the administrative law judge determined that employer identified three positions which were suitable for claimant and thus established the availability of suitable alternate employment. The administrative law judge then summarily concluded that the extent of claimant's disability changed from total to partial on May 16, 2003, the date of employer's first labor market survey. Decision and Order at 13. Of the three positions accepted by the administrative law judge as being suitable and available to claimant, however, only the bus attendant/greeter job at Foxwoods Casino was contained in the May 16, 2003 survey.[2] EXs 4, 9. The remaining two employment opportunities, that of a front office clerk at Lyme Shore Sports Club and an answering service operator at Central Communications, were listed in employer's May 6, 2004, labor market survey. Tr. at 74, 83-84, 86-87; EX 9. Since the sole employment position in the May 16, 2003 survey found by the administrative law judge to be suitable is an entry-level job, it may be insufficient alone to meet employer's burden and thus establish an onset date in May 2003. *See P & M Crane Co.,* 930 F.2d 424, 24 BRBS 116(CRT); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).[3] Accordingly, we vacate the

[2] This position was again included in the May 6, 2004, labor market survey, along with the other two positions. EXs 4, 9.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit, which has not addressed the precise issue of whether a single job suffices to show suitable alternate employment. In *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), the Fourth Circuit held that the identification of a single job opening does not satisfy employer's burden of establishing the availability of suitable alternate employment. However, the United States Court of Appeals for the Fifth Circuit, in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), stated that an employer can meet its burden by demonstrating the general availability of suitable positions, and where only one job is identified, it may suffice if employer shows the employee has a reasonable likelihood of obtaining the job. *See also Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Such circumstances would exist, for example, where the employee is highly skilled, the job relied upon by employer is specialized and the number of workers with suitable qualifications is small. *Id.* Where a single position is shown and it is an entry-level job which does not require either a high school diploma or specialized skills and employer proffers no evidence of the general availability of suitable jobs, the Board has held that employer has not shown suitable alternate employment under either court's precedent. *See Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

administrative law judge's finding that employer established the availability of suitable alternate employment on May 16, 2003, and remand the case for the administrative law judge to reconsider the date on which employer established the availability of suitable alternate employment, thus converting claimant's disability from total to partial, in accordance with the case precedent.

Lastly, claimant contends that the administrative law judge should have ordered employer to pay interest on the award of past-due compensation. Claimant alleges that as a result of the proceedings before the administrative law judge, his past-due compensation, primarily cost of living increases, amounts to $20,192.46. We agree that claimant is entitled to interest on past-due compensation. Interest has consistently been imposed on awards of compensation to ensure that claimant is fully compensated for his work-related injury. *See e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994). As interest is mandatory, on remand the administrative law judge must enter an appropriate award of interest.[4]

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment on May 15, 2003, is vacated, and the case is remanded for the administrative law judge to reconsider the date of onset of permanent partial disability and to award claimant interest on past-due compensation. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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[4] We reject claimant's request for an assessment of a 20 percent penalty on any interest which employer is ordered to pay. Claimant is entitled to such a penalty for the late payment of benefits pursuant to an award. 33 U.S.C. §914(f). As the administrative law judge's award did not provide for the payment of interest, employer cannot be considered to have made a late payment.

ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge