

CYNTHIA R. DANIELS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DATALINE, INCORPORATED	)	DATE ISSUED: 11/30/2005
	)	
and	)	
	)	
ROYAL INSURANCE COMPANY	)	
c/o FARA, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of Decision and Order on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2001-LHC-3049) of Administrative Law Judge Richard E. Huddleston 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This case is before the Board for the second time.

Claimant sustained a work-related injury on April 4, 2000, while working for employer as a firewatch. Employer voluntarily paid claimant temporary total disability benefits from April 8, 2000, until April 17, 2000, when she returned to work for employer as an administrative assistant. Claimant was laid off from that position on September 8, 2000, as part of a company-wide economic reduction-in-force. Claimant filed a claim for temporary total disability benefits from September 8, 2000, to March 4, 2001, and for continuing temporary partial disability benefits from March 5, 2001, when she began her employment as a sales associate with Dillard's Department Store.

In his Decision and Order, the administrative law judge found that claimant's physical restrictions did not affect the performance of her new job as an administrative assistant, that this position became her "usual employment," and that claimant failed to establish that her work injury prevented her from returning to her "usual employment" as an administrative assistant at the time of her economic layoff. The administrative law judge found that because claimant earned higher wages as an administrative assistant than she did as a firewatch she did not establish any loss of wage-earning capacity, and he therefore denied claimant any additional benefits.

On appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge for reconsideration of claimant's entitlement to benefits. The Board stated that, because claimant was working as a firewatch at the time of her injury, that position was her "usual employment" for purposes of establishing her *prima facie* case of total disability. The Board then noted that claimant would be entitled to total disability benefits upon her release by employer on September 8, 2000, until claimant obtained a position at Dillard's on March 4, 2001, unless employer established on remand that there was a range of suitable jobs available to claimant during this period. Moreover, the administrative law judge was instructed that if, on remand, he found suitable alternate employment to have been established, he must determine claimant's post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h).<sup>1</sup> *Daniels v. Dataline, Inc.*, BRB No. 03-0649 (Jun. 14, 2004)(unpub.).

In his Decision and Order on Remand, the administrative law judge determined that claimant had established a *prima facie* case of total disability commencing September 8, 2000, that employer established the availability of suitable alternate employment as of that date, that claimant did not diligently seek employment until March 5, 2001, when she commenced employment with Dillard's, and that the average of the

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<sup>1</sup> The Board additionally noted that by seeking only temporary partial disability benefits subsequent to March 4, 2001, claimant in effect conceded that her position at Dillard's constitutes suitable alternate employment, and that the administrative law judge on remand would not be constrained to find that this position establishes claimant's wage-earning capacity if he found that other suitable positions were available to claimant during this period of time.

wages in the full-time positions identified as being available and suitable for claimant established claimant's post-injury wage-earning capacity during the periods of time in which claimant sought benefits under the Act. As claimant's post-injury wage-earning capacity exceeded her pre-injury average weekly wage, the administrative law judge denied the ongoing disability benefits sought by claimant.

On appeal, claimant challenges the administrative law judge's denial of her claim. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially contends that she is entitled to temporary total disability benefits during the period September 9, 2000, through March 4, 2001, the date upon which she commenced employment with Dillard's Department Store. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Where, as here, claimant has established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1999); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4<sup>th</sup> Cir. 1988); see also *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988). Once employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that she remains totally disabled if she demonstrates that she diligently tried and was unable to secure such employment. See *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

In the instant case, the administrative law judge determined that employer established the availability of suitable alternate employment as of September 8, 2000,<sup>2</sup> that claimant did not diligently seek such employment until March 5, 2001 when she commenced employment with Dillard's Department Store, and that claimant's post-injury wage-earning capacity during this period exceeded her pre-injury average weekly wage. Decision and Order at 14-20. As claimant thus sustained no loss of wage-earning capacity between September 8, 2000, and March 4, 2001, the administrative law judge denied the benefits sought by claimant during this period of time. In her brief, claimant asserts only a general entitlement to benefits during this period and does not challenge the administrative law judge's specific findings regarding suitable alternate employment, claimant's diligence in seeking such employment or claimant's post-injury wage-earning capacity. Accordingly,

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<sup>2</sup> In this regard, the administrative law judge determined that employer had identified 9 general positions constituting suitable alternate employment. Decision and Order on Remand at 18.

the administrative law judge's denial of disability benefits during the period of September 8, 2000, through March 4, 2001, is affirmed.

Claimant contends that the administrative law judge erred in finding that she did not establish a loss in her post-injury wage-earning capacity as of March 5, 2001, based on her actual earnings while employed part-time by Dillard's Department Store. We disagree. An award for temporary partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(e). Section 8(h) of the Act provides that claimant's earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). Among the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent her post-injury wage-earning capacity are claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variables that could form a factual basis for the decision. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4<sup>th</sup> Cir. 2002); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

As discussed, the administrative law judge on remand credited the labor market survey prepared by employer's vocational expert to find that multiple, suitable full-time employment opportunities existed for claimant in the relevant labor market area as of September 8, 2000. The administrative law judge determined that the average of the hourly wages of the suitable jobs in the survey represented claimant's wage-earning capacity following claimant's lay-off, and he concluded that these jobs also represented claimant's wage-earning capacity after March 4, 2001, when she commenced part-time work at Dillard's.

We affirm this finding. As we stated in our prior opinion, the administrative law judge was not required to rely upon claimant's actual earnings if other suitable positions were representative of her wage-earning capacity. *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5<sup>th</sup> Cir. 1990). Contrary to claimant's contention, the administrative law judge considered whether claimant's actual earnings established her wage-earning capacity in accordance with the dictates of Section 8(h), but found the other jobs better represented claimant's earning capacity. While, as claimant avers, she was employed on a part-time basis at Dillard's, claimant cites no evidence that she had medical restrictions limiting her to part-time work. As the administrative law judge's findings are rational and supported by substantial evidence, we affirm his rejection of claimant's actual earnings, his calculation of claimant's post-injury wage-earning capacity based upon an average of the salaries paid by the positions identified as constituting suitable alternate employment, and his consequent denial of the disability benefits sought by claimant. *See*

*Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5<sup>th</sup> Cir. 1998);  
*Tann*, 841 F.2d 540, 21 BRBS 10(CRT).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge