BRB No. 00-1030

DALE SAVOIE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRINITY MARINE GROUP	)	DATE ISSUED: <u>July 13, 2001</u>
	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Employer's Motion for Rehearing of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Collins C. Rossi and Richard C. Ely, Jr. (Tolar & Rossi), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Employer's Motion for Rehearing (1999-LHC-2486, 2487) of Administrative Law Judge James W. Kerr, Jr., 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 contended that he injured his back in a work-related incident on June 24, 1994, and that he re-injured his back on August 25, 1995, when his supervisor accidentally spilled hot coffee on his lap, while claimant was working light duty from the initial accident. The administrative law judge found that claimant produced sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer failed to establish rebuttal thereof. Therefore, the administrative law judge found that claimant's back condition is work-related. The administrative law judge found that claimant cannot return to his usual work and that employer established suitable alternate employment as of the date of the January 31, 2000, hearing, when claimant testified he could perform some of the jobs identified in employer's October 1998 labor market survey. The administrative law judge awarded claimant temporary total disability benefits from August 25, 1995 until January 30, 2000, and temporary partial disability benefits from January 31, 2000 and continuing. 33 U.S.C. §908(b), (e). The administrative law judge also awarded claimant medical benefits under Section 7, 33 U.S.C. §907. The administrative law judge denied employer's motion for reconsideration.

Employer's sole contention on appeal is that the administrative law judge erred in finding that January 31, 2000, is the date of onset of claimant's partial disability rather than October 27, 1998, the date of employer's labor market survey. Claimant has not responded to this appeal.

Once, as here, the claimant establishes his inability to return to his usual work, it is employer's burden to establish the availability of realistic jobs, within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P& M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S.826 (1986). Employer's vocational consultant, Nancy Favaloro, identified seven sedentary and/or light alternate positions she believed suitable for claimant.[1] EX 6. She reviewed the medical reports on claimant prior to identifying potentially suitable positions, noting that Dr. Phillips, claimant's treating physician, had not outlined any work restrictions, but that he had recommended surgery. *Id.* Ms. Favaloro testified that she did not take into account the physical findings of Dr. Phillips or claimant's medications in determining the suitability of the alternate positions. Tr. at 85.

The administrative law judge credited the treatment notes of Dr. Phillips, an orthopedic surgeon, that claimant has lumbar disc displacement, is in need of surgery which has not been authorized, and was totally disabled from September 1995 through claimant's last visit on October 26, 1999. CX 1 at 4-13. Claimant, however, testified at the formal hearing that he could perform the dispatcher, car door unlocker, and repair technician positions for six hours a day, and the flow meter repair mechanic position for eight hours a day. Tr. at 118-121. The administrative law judge thus concluded that employer established suitable alternate employment as of the date of the formal

[1]These are dispatcher, car door unlocker/technician, unarmed security officer, repair technician, security guard, office building security officer, and flow meter repair mechanic. EX 6.

hearing.

We reject employer's contention that the administrative law judge's finding is in error. Although case law establishes that partial disability benefits commence on the earliest date that alternate employment is shown to be available, *see Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), it is axiomatic that the available work also must be suitable for claimant. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). It is employer's burden to establish the suitability of the positions it identifies. *See generally SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge credited the reports of Dr. Phillips stating that claimant was totally disabled through October 1999, thus demonstrating claimant's inability to perform the alternate employment identified. *See generally Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Employer did not show the suitability of the positions identified until the hearing when claimant testified as to his ability to perform some of the jobs. In this case, therefore, the administrative law judge properly established the onset of partial disability as of the date the available jobs were shown to be suitable, and we affirm his finding as it is rational, supported by substantial evidence, and in accordance with law.[2]

[2]We note that employer additionally contends that the administrative law judge erred in failing to discuss the evidence of record bearing on claimant's willingness to work. Because the administrative law judge rationally found the availability of suitable alternate employment established only as of January 31, 2000, however, he was not required to address the issue of whether claimant diligently sought work prior to that date. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

Accordingly, the administrative law judge's Decision and Order and Order Denying Employer's Motion for Rehearing are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge