BRB No. 06-0641

WILLIAM G. NEFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOSS MARITIME COMPANY	)	DATE ISSUED: 04/30/2007
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Denying Section 8(f) Relief of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

Kathleen H. Kim (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Denying Section 8(f) Relief (2005-LHC-1591) of Administrative Law Judge Jennifer Gee 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 full-time as a steamfitter until his retirement in October 1995. Subsequently, claimant began working part-time as a boilermaker, accepting dispatches from the union hall. He worked each job until completion, which usually lasted several weeks. Claimant worked less than half of the year preceding his injury, choosing to work part-time in order to avoid the heat of summer, to work on his home and to travel. Claimant was injured at work on May 14, 2003, when he fell from a ladder onto his right side. He complained of pain in his hip, buttocks, and right shoulder. He was diagnosed with a right sacroiliac fracture in his pelvic region and a right rotator cuff tear. Claimant underwent surgery on his shoulder on September 16, 2003, which was not successful as claimant still suffered from an impingement and tear of the rotator cuff. Although still in pain, claimant declined further surgery and physical therapy for his injuries. Claimant sought benefits under the Act. Employer controverted the claim for benefits, and filed an application for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In her decision, the administrative law judge found that it is undisputed that claimant cannot return to his usual work as a boilermaker. The administrative law judge also found that as claimant had worked part-time prior to his injury, the full-time positions identified by employer are insufficient to establish the availability of suitable alternate employment.[1] Thus, the administrative law judge awarded claimant permanent total disability benefits. In addition, the administrative law judge found that employer did not establish that claimant's work-related injury alone was not totally disabling. Therefore, the administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f).

On appeal, employer contends that the administrative law judge erred in finding that it did not establish suitable alternate employment, and thus in awarding permanent

[1] The administrative law judge also found that six of the eight positions identified did not meet claimant's physical restrictions as they required frequent sitting or walking.

total disability benefits. In addition, employer contends that the administrative law judge erred in denying Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Employer has filed reply briefs.

Employer contends that the administrative law judge erred in awarding total disability benefits as claimant "retains a significant wage-earning capacity." Employer asserts that it established that claimant has a post-injury earning capacity by demonstrating the availability of suitable alternate employment. The parties do not dispute that claimant is incapable of returning to his former duties as a boilermaker; he has therefore established a *prima facie* case of total disability. The burden thus shifts to employer to demonstrate the availability of suitable alternate employment, which requires that it demonstrate the availability of specific jobs which claimant is capable of performing given his physical restrictions and educational and vocational background. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In the present case, employer submitted a labor market survey which identified eight full-time positions.[2] The administrative law judge found that the positions of driver, deburrer and parking attendant, as well as one of the security guard and bench assembler jobs, did not meet claimant's restrictions as they require either frequent sitting or walking. Decision and Order at 15-16; Emp. Exs. 3, 4. Moreover, the administrative law judge found that all eight positions identified in the labor market survey were for full-time work, and thus were not suitable as claimant had been a part-time worker prior to the work injury. The administrative law judge therefore awarded claimant benefits for total disability.

In discussing the "unsuitability" of the full-time positions, the administrative law judge noted that "[a]lthough the legal standards for suitable alternate employment and wage earning capacity are different, the two inquiries are inherently interrelated, because where a claimant requests total disability benefits, the projected earnings from suitable alternate employment are treated as the claimant's wage earning capacity." Decision and Order at 14; 33 U.S.C. §908(h). Thus, the administrative law judge addressed the analysis required in determining a claimant's residual wage-earning capacity for purposes of partial disability pursuant to Section 8(h) and the Board's decision in *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979), wherein the Board discussed the variables relevant to a determination of an injured claimant's wage-earning capacity

[2] Specifically, the positions identified were security officer (2), deburrer, driver (2), bench assembler (2), and parking attendant. Emp. Exs. 3, 4.

under that section.[3] One such statutory factor is the claimant's "usual employment," and the Board noted that while this factor obviously concerns the effect of claimant's medical impairment on his ability to work in his usual job, the statute also encompasses consideration of the duties and wages of the usual work. *Id*. at 655-656 n.8. The Board stated that an employee who is working full-time when he is injured is entitled to compensation if he can work only part-time after the injury. The Board further stated that, "By the same token, we have noted that a claimant who is able to earn wages after injury comparable to pre-injury earnings only by expending more time and effort should be compensated." *Id.* at 658. Based on this law, the administrative law judge found that employer cannot establish suitable alternate employment by reference to full-time jobs where claimant was a voluntary part-time worker prior to his injury. The administrative law judge stated that employer cannot be permitted to benefit by forcing claimant to work more hours post-injury in order to reduce his loss in wage-earning capacity.

We agree with employer that the administrative law judge's extension of the wage-earning capacity analysis to the suitable alternate employer issue cannot be affirmed, as the purpose of the latter analysis is to determine whether the claimant retains *any* wage-earning capacity, whereas the former concerns the degree of that wage-earning capacity. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *see also Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982). It is uncontested that claimant is capable of full-time work which is within his medical restrictions. Cl. Ex. 4 at 36. That he chose to work part-time prior to his injury does not affect the

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[3] Section 8(h) provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h).

analysis of the suitability of the positions identified by employer, as retirement considerations unrelated to injury generally are not relevant in traumatic injury cases.[4] *See Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). The suitability inquiry encompasses factors such as claimant's age, education, technical or verbal skills, vocational history and physical restrictions. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *see also Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001). Thus, the fact that one security guard and one bench assembler position are full-time does not negate a finding that they are otherwise suitable, given the relevant factors. As the administrative law judge found that claimant could perform these two jobs, but that they were unsuitable only because they were full-time, we hold that employer established the availability of suitable alternate employment. *See Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). Claimant therefore has some retained wage-earning capacity and is at most partially disabled.[5] *Dove v. Southwest Marine of San Francisco,* 18 BRBS 139 (1986). Thus, we vacate the administrative law judge's finding that claimant is entitled to total disability benefits.

The inquiry then turns to determining the extent of claimant's disability, and, at this juncture the administrative law judge can properly consider claimant's pre-injury, part-time status. Section 8(h) requires the administrative law judge to determine a claimant's post-injury wage-earning capacity based on any factors which may affect his capacity to earn wages in his disabled condition. *See* n. 3, *supra.* In order to determine the amount that reasonably represents the claimant's wage-earning capacity, the administrative law judge must consider the nature of the injury, the degree of physical impairment, claimant's usual employment, and any other factors or circumstances which may affect his capacity to earn wages. *Devillier,* 10 BRBS 649. As the administrative

[4] Thus, we agree with employer's contention that the regulation at Section 702.601(c), 20 C.F.R. §702.601(c), which the administrative law judge cited, is inapposite in this case. The regulation addresses the status of a claimant with an occupational disease which does not immediately result in death or disability who returns to the workforce in a limited degree, which is not at issue in the present case. *See generally Hoffman v. Newport News Shipbuilding & Dry Dock Co.,* 35 BRBS 148 (2001).

[5] Although the administrative law judge did not reach the issue of claimant's diligence in seeking alternate work, she noted claimant's testimony that he did not apply for the jobs identified because they were low-paying, uninteresting jobs that required a full-time commitment. Tr. at 30-31. There is no other evidence of a post-injury job search. Thus, claimant cannot rebut employer's showing of suitable alternate employment. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

law judge did not determine claimant's post-injury wage-earning capacity, we remand the case for her to do so.

In her discussion on suitable alternate employment, the administrative law judge rationally determined that computing claimant's residual wage-earning capacity based on full-time hours increases claimant's post-injury earning capacity only by requiring him to expend more effort and to work additional hours. *Devillier*, 10 BRBS at 658. In *Devillier*, the Board discussed *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411 (9th Cir. 1971), in which the Ninth Circuit affirmed a finding that higher post-injury earnings do not preclude a finding of a loss in wage-earning capacity when the reason for the higher wages was the claimant's working an extra shift. Similarly, in this case claimant's post-injury wage-earning capacity may not be reflected by the full-time wages paid by the two suitable positions. On remand, the administrative law judge may calculate claimant's wage-earning capacity based on part-time wages extrapolated from the suitable jobs, or on any other relevant evidence of record.[6] *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001); *see also Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

Employer next contends that the administrative law judge erred in denying it relief from continuing compensation liability pursuant to Section 8(f). Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull*, 86 F.3d 895, 30 BRBS 49(CRT). The contribution element may be satisfied with "medical or other evidence" demonstrating that the current disability is not due solely to the subsequent injury and is materially and substantially worsened by the pre-existing disabilities. *Sproull*, 86 F.3d at 900, 30 BRBS at 52(CRT).

[6] For example, the administrative law judge could use hourly rates from suitable post-injury jobs multiplied by a number of hours per week similar to the hours claimant worked pre-injury. *See Ryan v. Navy Exchange Service Command*, ___ BRBS ___, BRB No. 06-0403 (Jan. 18, 2007).

The administrative law judge found that claimant suffered from pre-existing arthritis in his hips and feet, as well "deteriorating, herniated, and bulging discs," in his back, and that these conditions were manifest to employer through claimant's medical records. Decision and Order at 17-18. The administrative law judge denied the claim for Section 8(f) relief, finding the contribution standard was not satisfied as employer did not establish that claimant's disability was not solely due to her work injury.[7] *Id.* at 19-20. Employer contends that the administrative law judge erred in finding that these pre-existing conditions do not contribute to claimant's current disability, which is only partial in extent.

The administrative law judge found that claimant suffered injuries in the work accident that were themselves totally disabling, including a right sacroiliac fracture, a right full-thickness rotator cuff tear at the supraspinatus tendon, a right deltoid detachment, and strains in his right hip and lumbar region. The administrative law judge also found that the record does not contain any medical records or other evidence showing a relationship between claimant's pre-existing disabilities and his current disability. On appeal, employer merely recites the evidence concerning claimant's pre-existing conditions, but does not point to an error in the administrative law judge's finding that there is no evidence demonstrating how claimant's pre-existing disabilities affect his current disability, whether total or partial. Claimant's disability must be due to both the pre-existing and current injuries, and the pre-existing conditions must materially and substantially contribute to that disability. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT). Based on the administrative law judge's finding regarding the severity of claimant's work injuries alone, we conclude that substantial evidence supports the administrative law judge's finding that employer did not establish the contribution element. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989). Therefore, we affirm the administrative law judge's finding that employer is not entitled to relief pursuant to Section 8(f). *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

[7] The administrative law judge applied the standard applicable in a case of permanent total disability due to her finding suitable alternate employment was not established. In both cases of permanent total disability and permanent partial disability, employer must show that the current disability is not solely due to the last injury.

Accordingly, the administrative law judge's award of total disability benefits is vacated, and the case is remanded for further findings regarding the extent of claimant's disability. The administrative law judge's denial of Section 8(f) relief is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge