BRB No. 05-0781

EVERETT NECAISE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HALTER MARINE	)	DATE ISSUED: 04/28/2006
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement Kennington, Administrative Law Judge, United States Department of Labor.

Patrick E. O'Keefe and Michaela E. Noble (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-LHC-245) of Administrative Law Judge Clement Kennington 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 for almost 24 years as a shipyard welder, welder foreman and leadman welder. He was injured on July 12, 2001, when he fell approximately five feet into the hold. He began treatment with his general practitioner, who referred him for

numerous tests and consultations with specialists. Employer voluntarily paid temporary total disability benefits from July 13, 2001 to February 3, 2002, when claimant was released by his physician for work with restrictions. Claimant began working a light-duty position in employer's office until March 22, 2002, when he was laid-off due to the plant's closing. Employer paid temporary total disability benefits from March 23, 2002, until July 23, 2002, when Dr. Lowry released claimant to return to his former work. Claimant attempted to work as a roofer in June 2003, but quit this job after three weeks due to back and leg pain and an inability to climb. Subsequently, claimant began working 30 hours a week at a repair garage where he cleans parts and drives a truck to pick up automobile parts. Claimant sought permanent partial disability benefits under the Act.

In his decision, the administrative law judge found that claimant reached maximum medical improvement as of May 21, 2002, and that claimant cannot return to his former work as a welder due to his physical restrictions and pain. In addition, the administrative law judge found that claimant was terminated from his light-duty job with employer after seven weeks because of economic reasons, and not due to his inability to do the work or to his malfeasance. Thus, the administrative law judge concluded that the position was no longer "reasonably available," and cannot constitute suitable alternate employment. The administrative law judge found that claimant is entitled to permanent total disability benefits from the date of his lay-off until July 15, 2003, when his current job began, and to permanent partial disability benefits thereafter. The administrative law judge also found that as employer did not submit any other evidence regarding claimant's wage-earning capacity, claimant's actual post-injury wages accurately and fairly reflect his wage-earning capacity of $6.25 per hour, or $187.50 per week. Thus, as claimant had an average weekly wage of $670, the administrative law judge found that claimant suffered a loss in wage-earning capacity of $482.50 per week. 33 U.S.C. §908(c)(21), (h).

On appeal, employer contends that the administrative law judge erred in finding that employer had to establish suitable alternate employment after claimant was terminated from his light-duty job due to economic reasons. Thus, employer contends that as claimant did not have a loss in wage-earning capacity due to his injury, he is not entitled to benefits after the layoff. Claimant did not respond to this appeal.

The administrative law judge found that claimant is unable to return to his usual employment duties, and thus the burden shifted to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS

79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If employer establishes suitable alternate employment in this manner, as employer did in this case, employer bears a renewed burden of establishing suitable alternate employment when claimant is laid off from the job at employer's facility for economic reasons, in order to defeat claimant's entitlement to total disability benefits. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Employer contends that it provided claimant with a suitable light-duty job at its facility, and that claimant was laid-off for economic reasons, rather than due to his inability to perform the job or to malfeasance.[1] Thus, employer contends it did not have a further duty to establish suitable alternate employment. In *Hord*, the United States Court of Appeals for the Fourth Circuit addressed the issue of employer's liability for total disability compensation after employer laid off an injured worker from a suitable post-injury position. The court concluded that, since employer made the suitable job unavailable, it bore a renewed burden of demonstrating the availability of other suitable alternate employment. *Id.* Similarly, in *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), the Board held that where an employer provided claimant with a job in its facility but then laid claimant off for economic reasons, that job did not meet its burden of establishing suitable alternate employment during the layoff period. Once employer withdrew the opportunity for such work, suitable alternate employment in employer's facility was no longer available. *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994)(court held that short-lived employment did not establish that suitable alternate employment was realistically and regularly available on the open market). *Hord* is consistent with *Turner*, in that *Turner* places on employer the burden of establishing "reasonably available" jobs that are suitable for the claimant. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. A short-lived job that is withdrawn by employer due to no fault of claimant is not a "reasonably available" job.

Thus, we reject employer's contention that the administrative law judge erred in requiring employer to establish suitable alternate employment once claimant was terminated for economic reasons from his light-duty job. While employer is not required to act as an employment agency for claimant, disability under the Act is an economic as

[1] It is well established that where claimant loses a suitable job in employer's facility due to his own misconduct, employer need not establish the availability of other suitable alternate employment. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

well as a medical concept, and thus cannot be measured by claimant's physical condition alone. *Turner,* 661 F.2d at 1042-43, 14 BRBS at 160; *see also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). As the administrative law judge rationally found, employer must establish the availability of jobs claimant can perform given his physical restrictions and other relevant factors, including economic factors. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). Therefore, we affirm the administrative law judge's finding that the position at employer's facility is insufficient to establish that alternate employment was available to claimant after the date of his layoff.[2] *Hord,* 193 F.3d 794, 33 BRBS 170(CRT). As employer has not otherwise challenged the administrative law judge's award, we affirm the administrative law judge's award of permanent partial disability benefits based on claimant's wages at the repair garage as representive of his wage-earning capacity. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

[2] We reject employer's contention that this analysis violates the Equal Protection Clause of the Fifth Amendment of the United States Constitution by holding employers to different standards depending on whether suitable alternate employment is shown on the open market or via a job at employer's facility. Where suitable alternate employment is shown via a job at employer's facility, it need not demonstrate job availability on the open market. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Employer's withdrawal of a suitable job at its facility results in its needing to meet the open market standard. In order to show suitable employment on the open market, employer must demonstrate that jobs are realistically available. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Thus, the standards are not dissimilar. In addition, there is a rational basis for holding the employer to the standard required by *Norfolk Shipbuilding & Drydock Corp. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), when it provides a suitable job at its facility in that an employer who rehires its disabled employee has direct control over his fate and could have an economic incentive to hire claimant for a short time and then discharge him from a light-duty job in order to avoid greater liability under the Act.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge