BRB No. 98-0805

ERIC W. HARBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Jay A. York (Sherling, Browning & York, P.C.), Mobile, Alabama, for claimant.

Paul M. Franke (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-1531) of Administrative Law Judge Clement J. 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 findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a first class shipfitter, suffered two injuries to his back during the course of his employment on January 21, 1992, and January 18, 1995. Following each injury, claimant returned to work with this employer although following the second injury he was under physical restrictions on his climbing, lifting, bending and stooping, and was required to rest for twenty minutes every two hours. Following the second injury in January 1995, claimant returned to restricted work on August 25, 1995, EX 12, and continued working in this position until he was involved in a general, economic layoff based upon seniority on October 4, 1996; claimant was recalled to work on May 19, 1997.

Claimant sought disability benefits under the Act during the period of his layoff.[1] In his decision, the administrative law judge found that any economic loss suffered by claimant between October 4, 1996, and May 19, 1997, was not the result of his work injury and that therefore he was not entitled to compensation during this period. Claimant appeals, contending that the administrative law judge erred in denying him benefits during the layoff. Employer responds, urging affirmance of the administrative law judge's decision.

It is undisputed that following his second work injury, claimant was unable to return to his usual pre-injury job activities. Once claimant demonstrates an inability to return to his usual work, employer may prove that claimant is at most partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet its burden by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Larsen v. Goltten Marine Co.*, 19 BRBS 54 (1986), so long as the job is necessary and claimant is capable of performing it. *Diosdado v. Newpark Shipbuilding & Repair Inc.*, 31 BRBS 70 (1997). The administrative law judge found that under the

[1]Claimant received temporary total disability benefits for approximately the first four weeks of the layoff (October 4 through November 14, 1996), JX 1; he was employed by Lowe's Home Improvement Warehouse from March 7 through May 19, 1997. HT at 19-21. Claimant, therefore, is seeking temporary total disability compensation from November 15, 1996, through March 6, 1997, and temporary partial disability compensation from March 7 through May 19, 1997.

circumstances of this case, during a general lay-off in which claimant suffered a loss of employment unrelated to his work injury, claimant must take his economic chances with the rest of the work force and is not entitled to disability compensation during this period.

We agree with claimant that the administrative law judge's denial of all benefits during the layoff cannot be affirmed. While an employer may rely upon a job within its own facility to meet its burden of establishing the availability of suitable alternate employment, that job must be actually available to claimant. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Mendez v. National Steel and Shipbuilding Co.*, 21 BRBS 22 (1988). Where a claimant establishes a *prima facie* case of disability as here, and employer withdraws the opportunity for light duty work, through no misfeasance on claimant's part, with the result that suitable alternate employment in the employer's facility is no longer available, employer cannot avoid liability for total disability absent the showing of other suitable alternate employment. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Thus, by relying solely on a light-duty job in its own facility that was eliminated due to an economic layoff, employer has failed to prove that suitable alternate employment was actually available to claimant during the period of the layoff. Absent a showing of suitable alternate employment, claimant is entitled to benefits for total disability. *Vasquez*, 23 BRBS at 431; *Mendez*, 21 BRBS at 25. Therefore, the administrative law judge's conclusion that claimant is not entitled to benefits during the lay-off period cannot stand. The record reflects, however, that claimant, on his own initiative, was able to locate employment from March 7, 1997, until his return to work with employer; this position may establish that claimant was only partially disabled during this time. *Wilson*, 22 BRBS at 465-466. We, therefore, vacate the administrative law judge's determination that claimant is not entitled to benefits during the lay-off period, and remand the case for the administrative law judge to determine the extent of claimant's disability during this time.

Accordingly, the administrative law judge's decision denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge