BRB No. 04-0202

KIMBERLY A. DUHON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ORANGE SHIPBUILDING COMPANY, INCORPORATED	)	DATE ISSUED: Nov. 10, 2004
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-0033) of Administrative Law Judge C. Richard Avery 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).

Employer hired claimant as a third-class helper on February 9, 1999. On February 23, 1999, claimant sustained a work-related injury on a tugboat when she stepped into a hole which had been covered by plastic, causing her to fall approximately 15 to 20 feet into the galley below. Employer transported claimant to the emergency room, where she was treated for complaints of neck and lower back pain, and bruises. The emergency room physician released claimant with a prescription for pain and anti-inflammatory medication, and allowed her to return to work the following day, restricting her to light duties. Employer assigned claimant to light-duty work, beginning on February 24, 1999.[1]

From February 24 to March 31, 1999, claimant treated at employer's clinic with Dr. Williams, who continued claimant's light-duty work restrictions. On April 9, 1999, claimant began treating with Dr. Hayes, at the Beaumont Bone & Joint Clinic, after completing a "choice of physician" form. Dr. Hayes continued to restrict claimant to light-duty work, specifically prohibiting stooping, bending, climbing and lifting, and stating that she should not work at all if employer could not provide her light-duty work. At her second visit on April 29, 1999, Dr. Hayes informed claimant that, although he was continuing her light-duty restrictions, the doctor anticipated that he would be releasing her to her usual work duties after he evaluated her again in three weeks. EX 10 at 14. Instead of returning to Dr. Hayes in three weeks, however, claimant, on the advice of her then attorney, Mr. Adroit, began treating with Dr. Moore, a chiropractor. Dr. Moore took claimant off work from May 5, 1999 until May 19, 1999. CX 2 at 13.

On May 19, 1999, employer terminated claimant's employment due to her violation of the company call-in policy. EX 1 at 14. Claimant had been warned of her violations on March 15 and April 19, 1999. *Id.* at 19. After her second written warning, claimant was suspended for three days and, as claimant admitted, employer then advised her that the next violation of its call-in policy would result in her immediate termination. *Id.* at 19-20.

Claimant filed a claim under the Act, seeking temporary total disability benefits from May 5, 1999 to May 28, 1999, for the time Dr. Moore restricted claimant from performing any work, and continuing temporary partial disability benefits from May 29, 1999. Tr. at 30-32. Following her termination from employer, claimant worked in various non-maritime positions.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffered a work-related accident on February 23, 1999. Therefore, the administrative law judge found claimant presented sufficient evidence to establish her *prima facie* case and invoke the Section 20(a) presumption of causation, 33 U.S.C. §920(a). The administrative law judge found that employer presented insufficient evidence to establish rebuttal of the presumption, as he rejected employer's contention

[1] The emergency room records reflect that claimant was released to light duty "on 2/24/99 x7 days." The doctor also checked a box stating "primarily sitting duty with occasional walking/standing." EX 9 at 144; EX 13.

that either one or both of claimant's subsequent automobile accidents were an intervening cause of claimant's current condition. The administrative law judge also found that claimant could benefit from further medical treatment, and therefore, awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, excluding the treatment with Dr. Moore, as he found it was not reasonable, necessary, or authorized.

Finally, regarding the extent of claimant's disability, the administrative law judge found that employer established suitable alternate employment with the light-duty assignments it provided claimant in its facility. Accordingly, the administrative law judge concluded that claimant's inability to perform her post-injury job at employer's facility on or after May 19, 1999, was due to her own misfeasance in violating a company rule, and that therefore any loss in wage-earning capacity thereafter is not compensable under the Act. Accordingly, the administrative law judge denied claimant disability benefits.

On claimant's motion for reconsideration, the administrative law judge rejected claimant's argument that the light-duty position employer provided in its facility was not suitable given the restrictions imposed by Dr. Hayes on April 9, 1999. The administrative law judge concluded that claimant's stated ability to perform the tasks employer assigned are the "best evidence" of the suitability of the job employer provided despite the work restrictions Dr. Hayes imposed on claimant. Decision On Recon. at 1-2. The administrative law judge also found that claimant's light-duty job with employer was not sheltered employment, because claimant's activities were useful maintenance for the upkeep of the shipyard. The administrative law judge therefore denied claimant's motion for reconsideration.

On appeal, claimant alleges that the administrative law judge erred in finding that the light-duty job employer offered in its facility constituted suitable alternate employment. Claimant therefore contends that she is entitled to disability benefits following her termination.

Once, as here, claimant establishes that she is unable to return to her pre-injury employment because of her work injury, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing and for which she can realistically compete. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a suitable job in its facility, including a job tailored to her specific restrictions as long as the work is necessary. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid, even if she cannot do the work and which is unnecessary; such employment is insufficient to constitute suitable alternate employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Harrod v. Newport News*

Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980). If claimant successfully performs light-duty work at her employer's facility, but is discharged for violating a company rule, any loss in claimant's wage-earning capacity thereafter is not compensable; it is claimant's own misconduct which has made the suitable position unavailable. *See 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).

Claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment at its facility. In this regard, claimant contends that the administrative law judge did not determine whether the job was within the restrictions imposed by Dr. Hayes. Claimant also contends that the work was "sheltered employment" as employer offered no evidence that the work was necessary, profitable or that several shifts performed the same work. Finally, claimant contends that the administrative law judge failed to address the fact that Dr. Moore restricted her from working at all from March 5 to March 19, 1999.

Although the administrative law judge did not specifically address the suitability of the job at employer's facility in view of Dr. Hayes's restrictions, we hold, on the facts of this case, that the administrative law judge provided rational reasons for concluding that the job was suitable.[2] The administrative law judge rationally relied on claimant's testimony that she was able to perform her duties, in spite of the restrictions imposed by Dr. Hayes and her pain. Decision and Order at 16; Decision on Recon. at 2; Tr. at 130. The administrative law judge found that claimant was accommodated in that she could perform her tasks while sitting and rest as needed. Finally, the administrative law judge found that, following her termination, claimant was able to perform a "host of jobs."[3] Decision and Order at 16. In this regard, the administrative law judge stated that claimant was never fired from a job for her failure to perform the required duties in a satisfactory manner, and that her jobs would have required a similar amount and manner of physical

[2] The job entailed sweeping, painting poles, drilling conduct boxes, and picking up styrofoam peanuts. Tr. at 55.

[3] Claimant first worked at the Market Basket grocery store as the frozen food and dairy manager. She was required to lift several gallons of ice cream at a time, approximately 10 pounds, which she considered "heavy" lifting. Tr. at 91. Claimant then worked at the Dollar Store as a cashier. Claimant next worked at M&M construction as a "go for." Tr. at 97. She then worked at a Bordertown, a truck stop, in a job that allowed her to sit down as needed. Claimant also worked as a newspaper deliverer for the Orange Ledger. Claimant also was a waitress and receptionist for Pizza Hut, and finally a receptionist for H&R Block during tax season. Tr. at 75-83. The administrative law judge noted that claimant testified that she performed all of the above jobs without restrictions or any significant problems. Tr. at 90.

exertion as her light-duty assignment with employer.[4] Tr. at 90. Thus, the administrative law judge determined that claimant's testimony and post-termination employment established that the light-duty assignments at employer's facility were within her restrictions. In addition, the administrative law judge credited the hearing testimony of Shane Alfred, employer's Director of Human Resources, that employer was satisfied with claimant's modified work, that she did not complain about the work, and that she could have continued in this employment if she had not violated the call-in policy. Tr. at 190-193.

The administrative law judge is entitled to weigh the evidence and to assess the credibility of witnesses' testimony, and the Board will not interfere with credibility determinations unless they are "inherently incredible" or "patently unreasonable." *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within the administrative law judge's discretion to accept or reject all or any part of testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp.1321 (D.R.I. 1969). On the basis of the record before us, the administrative law judge rationally credited that portion of claimant's testimony that she was able to perform her light-duty work at employer's facility. Moreover, the administrative law judge rationally relied on claimant's performance of subsequent jobs, without physical difficulty, to find that the job employer provided was suitable. We therefore affirm the administrative law judge's finding that the job employer provided was suitable. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

The administrative law judge also rejected claimant's argument that the work was "sheltered employment," finding that claimant's activities during her weeks of light-duty employment were "logically the business of a shipyard, and as such both profitable and necessary," and that she provided useful maintenance for the upkeep and business of the shipyard. Decision and Order on Recon. at 2. We reject claimant's contention that the administrative law judge erred in this regard. Mr. Alfred testified that employer has a short-term light-duty program, Tr. at 186-187, and that employer works with the employees' restrictions to find them work they can perform. The fact that a position is narrowly tailored to the claimant's restrictions and that she could rest and was provided assistance as needed does not establish that position is "sheltered." There is no evidence

[4] The administrative law judge stated that claimant testified that she performed her job at Market Basket satisfactorily without any complaints regarding her ability to perform the job. She left after a disagreement with her manager. Decision and Order at 5; Tr. at 91. She testified that she left the Dollar Store for M&M where she could made more money. She left M&M after a disagreement with her boss. Tr. at 97. She stopped delivering papers because of transportation problems.

of record that the position was unnecessary and the administrative law judge found claimant capable of the duties assigned. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT).

Finally, we reject claimant's contention that the administrative law judge was required to credit the off-work slip Dr. Moore provided from May 5 to May 19, 1999. CX 2 at 13. Claimant testified that she went to see Dr. Moore, a chiropractor, because her back continued to hurt. Tr. at 137. She also stated, however, that her previous attorney sent her to Dr. Moore when it appeared Dr. Hayes would return her to full duty, and that seeing Dr. Moore was a "stupid idea." *Id.* In light of the administrative law judge's crediting of that part of claimant's testimony that she was able to perform the work employer provided, the administrative law judge was not required to rely on Dr. Moore's no–work slip. As claimant has raised no reversible error in the administrative law judge's consideration of the evidence, and his finding that employer established suitable alternate employment by providing claimant a light-duty job within its facility is rational and supported by substantial evidence, we affirm the denial of disability benefits, as claimant was terminated from a suitable job due to her violation of a company rule. *Brooks*, 26 BRBS 1; *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Accordingly, the administrative law judge's Decision and Order and Decision and Order Denying Claimant's Motion for Reconsideration are 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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BETTY JEAN HALL
Administrative Appeals Judge