BRB No. 98-0339

MORRISON BASS	)	
	)	
Claimant-Respondent	)	DATE ISSUED: _____
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand-Granting Temporary Total and Temporary Partial Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Remand- Granting Temporary Total and Temporary Partial Disability (92-LHC-2829) of Administrative Law Judge Richard K. Malamphy 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).

This case is before the Board for the second time. Claimant a shipfitter,

sustained an axial compression injury on May 30,1992, while working for employer. Subsequent to his return to work, claimant was reassigned to tank testing. He was absent from work from October 26, 1993 to November 15, 1993, and during this period, on November 10, 1993, he was examined by Dr. Morales, who returned him to work with restrictions. Employer, however, refused to accept Dr. Morales's restrictions, and returned claimant to his prior tank testing job. Employer subsequently gave claimant a 5-day, in-house suspension as a result of this absence, as it was undocumented. On May 16, 1994, after missing additional periods of work, claimant was discharged by employer for undocumented absences and excessive absenteeism. Thereafter, claimant obtained several light duty jobs paying $4.50 per hour from June 22, 1994, until August 21, 1994, and $5.75 per hour from August 18, 1994, until October 14, 1994. Since January 10, 1996, claimant has been employed as a sales clerk working 20-30 hours per week and earning $5.75 per hour. Claimant sought temporary total disability and temporary partial disability compensation under the Act.

In his initial Decision and Order, the administrative law judge found that claimant was not entitled to any benefits subsequent to May 17, 1994, because he had been discharged due to violations of employer's yard rules and not due to his work injury. Moreover, he found that employer established the availability of suitable alternate employment as of the time of claimant's discharge which would otherwise have remained available to him but for his discharge. Claimant appealed, challenging the administrative law judge's findings that his termination by employer was unrelated to his work injury, and that employer established the availability of suitable alternate employment. Employer responded, urging affirmance.

On appeal, finding *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993) dispositive, the Board affirmed the administrative law judge's determination that claimant was not entitled to compensation for any loss in his wage-earning capacity which occurred due to his discharge. Inasmuch, however, as the administrative law judge had not made a specific finding as to whether the tank testing job claimant was performing at employer's facility or any other jobs which were available prior to his discharge constituted suitable alternate employment, the Board vacated his finding that employer established the availability of suitable alternate employment, and remanded the case for reconsideration of this issue. In so doing, the Board instructed the administrative law judge that if the tank tester job was deemed unsuitable, employer could meet its suitable alternate employment burden by establishing the existence of other positions at its facility which were within claimant's restrictions and available to him prior to his discharge. Moreover, the Board instructed the administrative law judge that employer could not rely on positions other than the tank tester job if it had refused to make the other positions

available to claimant. *Bass v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 96-1158 (May 27, 1997)(unpub.).

In his Decision and Order on Remand, crediting the restrictions imposed by Dr. Morales, claimant's treating physician, which included limited pushing and pulling, no lifting more than 30 pounds four hours per day, and no climbing vertical ladders, working above shoulder level, or working in extreme temperatures, the administrative law judge initially determined that the tank testing job which claimant performed immediately prior to his May 1994 discharge was not suitable. The administrative law judge also found that employer failed to demonstrate suitable alternate employment based on Mr. Hoyer's testimony regarding other suitable positions allegedly available at its facility, as employer had never offered any of these jobs to claimant. Noting that employer had refused to acknowledge Dr. Morales's restrictions, and that the only job offered to claimant was the unsuitable tank testing job, the administrative law judge held, consistent with the Board's instructions on remand, that employer could not rely on the other positions allegedly available at its facility to establish suitable alternate employment because it had refused to make those jobs available to claimant. Accordingly, he awarded claimant the temporary total and temporary partial disability compensation claimed.

Employer appeals, arguing that the administrative law judge erred in finding that employer did not meet its burden of establishing suitable alternate employment based either on the tank testing job which claimant performed prior to his discharge or on Mr. Hoyer's testimony. Moreover, employer contends that the administrative law judge's determination that employer was required to offer claimant the alternate jobs available at its facility in order to meet its burden of establishing the availability of suitable alternate employment does not comport with applicable law. Employer avers that, as is the case where employer attempts to demonstrate the existence of suitable alternate employment available on the open market, where, as here, employer is relying on jobs within its facility to meet this burden, it need only establish that realistically available positions existed within its facility which claimant

could have performed.[1] Claimant responds, urging affirmance.

We affirm the administrative law judge's Decision and Order Upon Remand-Granting Temporary Total and Temporary Partial Disability as his findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. Where, as in the instant case it is undisputed that claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). One way that employer can meet this burden is by providing claimant with a suitable light duty job performing necessary work within its facility. *See Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). It is well-established that where employer provides claimant with a suitable job and claimant is terminated for reasons unrelated to his work-related disability, employer does not bear the renewed burden of showing other suitable alternate employment. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). In such a case, claimant is at most partially disabled, as his earnings in the suitable job may form the basis for the administrative law judge to determine claimant's wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

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[1]In the alternative, employer argues that claimant's disability benefits should not fluctuate between temporary total disability and temporary partial disability after his discharge, but instead should be limited to temporary partial disability compensation of $102.86 per week based on 66 2/3 percent of the difference between his stipulated average weekly wage of $462.32 and his post-injury earning capacity as a salesclerk at 7-11 of $154.45 per week. We need not address this argument, however, as it is being raised by employer for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

Initially, we reject employer's argument that claimant had no compensable disability as of his May 1994 discharge because the tank testing job claimant was performing at that time constituted suitable alternate employment. Based on the testimony of claimant and his supervisor, Mr. Singleton, regarding a tank tester's job duties, Tr. at 48-49, 54-64, 107, the administrative law judge rationally found that this job was not suitable for claimant in that it entailed climbing vertical ladders, overhead work, and working in cold conditions, in violation of Dr. Morales's restrictions. Moreover, he credited claimant's testimony that this work aggravated his neck. Tr. at 50-55. Inasmuch as claimant's testimony and that of Mr. Singleton provides substantial evidence to support the administrative law judge's finding that the tank testing job did not constitute suitable alternate employment, and employer has not established reversible error in the administrative law judge's decision to credit this testimony, we affirm his finding. *See Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Alternatively, employer asserts that the administrative law judge erred in concluding that employer had not met its burden of establishing suitable alternate employment based on Mr. Hoyer's testimony that additional suitable jobs were available to claimant at its facility, prior to his discharge, but were never offered to him.[2] The administrative law judge rationally rejected this argument. Unlike the situation where employer is attempting to demonstrate the availability of suitable alternate employment on the open market, where employer is relying on jobs within its facility to meet this burden, it may not claim that jobs within its exclusive control are available to claimant unless it actually makes the jobs available to him. *See Berkstresser v. Washington Metropolitan Area Transit Authority,* 16 BRBS 231 (1984), *rev'd on other grounds*, *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *see also Newport News Shipbuilding & Dry Dock Co. v. Cole*, No. 96-2535, 120 F.3d 262 (4th Cir. Aug 12, 1997)(table).[3] In the

[2]Employer asserts that other suitable alternate jobs existed at its facility prior to claimant's discharge, but states that such work was not offered to claimant because he was successfully working as a tank tester without complaint. In fact, as the administrative law judge found, employer offered no other job to claimant because it refused to accept the restrictions placed on his activities by Dr. Morales.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Pursuant to that court's Local Rule 36(c), the citation of an unpublished decision "is disfavored. . . ." Nevertheless, Local Rule 36(c) provides that an unpublished decision with precedential value may be cited in relation to a material issue in a case if there is no published opinion that would serve as well (if all other parties are served with a copy of the decision). The Fourth Circuit's

present case, as employer does not dispute that the only job it provided at its facility for claimant prior to his discharge was the tank testing job[4] which the administrative law judge rationally found was not suitable, we reject employer's arguments and affirm the administrative law judge's determination that employer also failed to establish the availability of suitable alternate employment based on Mr. Hoyer's testimony. As employer raises no additional allegations of error, the administrative law judge's award of temporary total disability and temporary partial disability compensation is affirmed.

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unpublished decision in *Cole,* which is readily available to both parties and which involved the same employer as in this case, states that where employer never offered any evidence demonstrating that Cole *was offered* a job within its facility or that suitable alternate employment existed in the open market, it failed to satisfy its burden. As there is no other published Fourth Circuit precedent on this issue, it is consistent with the court's rule to cite it in this case.

[4]As no other jobs were made available by employer, the fact that claimant was willing to stipulate that jobs existed at employer's facility consistent with Dr. Morales's restriction as of the date of the 1996 hearing, Tr. at 202, is irrelevant.

Accordingly, the administrative law judge's Decision and Order Upon Remand- Granting Temporary Total and Temporary Partial Disability is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge