BRB Nos. 00-545
and 00-545A

MARY E. PIERCE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Decision and Order on Claimant's and Employer's Motions for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

R.A. Osborn, Jr. and R.A. Osborn, III (Osborn & Osborn), Gretna, Louisiana, for claimant.

Wayne G. Zeringue, Jr. and Christopher S. Mann (Jones, Walker, Waechter, Poitevent, Carrére & Denégre, L.L.P.), New Orleans, Louisiana, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and Decision and Order on Claimant's and Employer's Motions for Reconsideration (99-LHC-325; 99-LHC-2433) 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 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).

Claimant initially injured her neck on December 30, 1991, while lifting a heavy steel

box. She returned to work and aggravated her injury, eventually undergoing surgery on January 13, 1994. She was released for modified duty for four hours a day on March 14, 1994, which was gradually increased to eight hours a day on October 31, 1994, with a restriction against heavy lifting. Claimant continued to experience flare-ups, causing her to miss work for several hours a day to several days at a time. She was terminated from her job on March 17, 1998, for excessive absenteeism. She has not worked since her termination and sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found that claimant reached maximum medical improvement on October 31, 1994, the date she was released for an eight-hour day. In addition, he found, based on Dr. Rozas's opinion, that claimant is unable to return to her former employment as a warehouseman. He found that the modified clerical position in employer's facility to which claimant returned after the surgery was suitable in light of claimant's restrictions, but that she was discharged due to absenteeism related to her shoulder pain. Thus, he found this position did not establish suitable alternate employment as of the date of claimant's termination. However, the administrative law judge found that the positions identified in the labor market survey submitted by employer were suitable given claimant's physical restrictions, and he awarded claimant permanent partial disability benefits accordingly. The motions for reconsideration of both parties were summarily denied.

On appeal, claimant contends that the administrative law judge erred in finding that the positions identified in the labor market survey constitute suitable alternate employment inasmuch as claimant must have a position with a flexible schedule due to the flare-up of her shoulder pain. Employer responds, urging affirmance of the administrative law judge's finding that the labor market survey establishes the availability of suitable alternate employment. However, on cross-appeal, employer contends that the administrative law judge erred in finding that claimant was terminated from her post-injury position for reasons associated with her employment injury. Thus, employer contends, her post-injury position constituted suitable alternate employment such that claimant suffered no loss in wage-earning capacity.

Initially, we will address employer's contention on cross-appeal that the modified position as a clerical worker at its facility was sufficient to establish suitable alternate employment following the date of termination. Employer contends that claimant's discharge was due to her excessive absenteeism, as over 70 percent of her absences were unrelated to her injury. Where, as here, it is undisputed that claimant cannot return to her usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may establish suitable alternate employment by virtue of a light duty position at its facility, so long as the job is necessary and claimant is capable of performing it.

Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). If a claimant is discharged from a suitable post-injury job for misconduct, employer does not bear the renewed burden of establishing suitable alternate employment. *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). However, if claimant is discharged for reasons related to her disability, employer is not absolved from liability for total disability unless it can establish the availability of other suitable alternate employment. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175, 179-180 (1996).

In the present case, the administrative law judge reviewed employer's attendance records and found that if the log did not specify why claimant was "sick" or at the "doctor," he would credit the absence to her work-related injury as the logs were maintained by employer. He therefore concluded that a majority of claimant's absence was due to her work-related injury and that she missed only an average of seven days per year for other reasons. Although employer correctly contends that claimant was absent for 470.2 hours through the years 1996-98, using the administrative law judge's findings, only 155.7 hours were allocated to personal reasons or sick time unrelated to her injury. The administrative law judge also noted that claimant was advised by her supervisor in January 1998 that she was not allowed any more absences, for any reason, because she was in danger of termination. He concluded that claimant would have been terminated even if all of her absences were due to her work-related injury. Thus, he concluded that claimant was terminated because of her work-related medical condition, and found that she is entitled to permanent total disability benefits from the date of her discharge until suitable alternate employment was again established.

Contrary to employer's contention, as employer was attempting to meet its burden with regard to suitable alternate employment by establishing that this light duty position was suitable for claimant given her work-related injury, it was required to establish that claimant's termination from this position was unrelated to her work injury. The administrative law judge found that the evidence, *i.e.*, the attendance records, was not sufficiently specific to establish that claimant's absenteeism was due to reasons other than her work-related injury. This finding is affirmed, as it is reasonable based on the evidence in this case. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). As his finding rests on a thorough review of the record and a logical interpretation of the evidence, it is apparent that the administrative law judge did not resolve "doubt" in claimant's favor, but rather found employer's evidence insufficient to establish that the position was in fact suitable for claimant. Therefore, we reject employer's contention that the administrative law judge violated the rule in *Director,*

OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994),[1] regarding the allocation of the burden of proof, and we affirm the administrative law judge's finding that the light duty position did not establish suitable alternate employment after the date of claimant's termination.

Claimant contends on appeal that the administrative law judge erred in finding the positions identified in the labor market survey are sufficient to establish the availability of suitable alternate employment inasmuch as they all require full-time attendance on a reasonable scheduled basis. In order to meet its burden of establishing suitable alternate employment, employer must show the general availability of job opportunities within the geographical areas where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *See 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), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

The administrative law judge reviewed the positions identified in the labor market survey and found that the light and sedentary positions such as toll collector, machine operator, telemarketer and parking cashier are well within claimant's restrictions as provided by Dr. Rozas and the functional capacity evaluation. As claimant correctly contends, Dr. Rozas opined that claimant would continue to have flare-ups of her shoulder pain and noted that she could expect to have approximately two weeks of lost time per year due to this injury. He also stated that she would probably experience more frequent difficulties as her condition is progressing. However, Dr. Rozas also opined that claimant is capable of working a 40 hour week, eight hours a day. Cl. Ex. 13 at 52. The administrative law judge found this statement in Dr. Rozas's opinion most persuasive and thus rejected claimant's contention that the positions identified in the labor market survey are not suitable. Claimant does not assign any other error to the administrative law judge's finding that these positions are suitable. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As substantial evidence supports the administrative law judge's finding that the jobs in the labor market survey constitute suitable alternate employment, we affirm the award of permanent partial disability benefits. *See Fox v. West State Inc.*, 31 BRBS 118 (1997).

Accordingly, the Decision and Order of the administrative law judge awarding

[1]The United States Supreme Court held in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), that if evidence is evenly balanced, the party that bears the burden of persuasion must lose.

permanent partial disability benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge