BRB No. 00-0919

TIMOTHY GRANGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: June 11, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion to Compel and the Decision and Order Denying Claim of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason), 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:

Claimant appeals the Order Denying Motion to Compel and the Decision and Order Denying Claim (97-LHC-2571) of Administrative Law Judge Richard E. Huddleston 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 injured his back during the course of his employment with employer as a handyman on February 18, 1986. Claimant underwent a hemilaminectomy at L5-S1 on March 11, 1986. Claimant was released to return to work on January 30, 1987, with restrictions against lifting over 40 pounds, repeated lifting, twisting or stooping, and working in tight places. Claimant worked for employer as a machine operator within these restrictions until April 23, 1992, when claimant was terminated for reporting to work while under the influence and for testing positive for marijuana. Subsequently, claimant obtained employment as a machine operator at O & K Escalators (O & K) in August 1992. Claimant reported radiating low back pain to his treating physician, Dr. Garner, on January 12, 1994. An MRI disclosed a recurrent disc herniation at L5-S1, for which claimant underwent bilateral hemilaminotomies on February 1, 1994. On June 20, 1994, O & K notified claimant that it was unable to accommodate his work restrictions. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from January 22, 1994, to November 13, 1994. Claimant sought continuing total disability benefits under the Act.

On June 4, 1998, claimant filed a motion to compel employer to answer specific interrogatories, which claimant averred would establish that his prior post-injury job with employer was eliminated pursuant to a reduction in force; therefore, claimant alleged that this light duty position, which claimant successfully performed prior to his termination on April 23, 1992, no longer establishes the availability of suitable alternate employment. In his Order Denying Motion to Compel, the administrative law judge found that, pursuant to *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), the availability of claimant's light duty job after his discharge for causes unrelated to his disability is immaterial, as any loss of wage-earning capacity after claimant's discharge for malfeasance is not compensable.

At the formal hearing on August 13, 1998, the parties stipulated that the sole issue in dispute before the administrative law judge is whether employer has a renewed burden to establish the availability of suitable alternate employment after claimant was released to return to work in 1994, with additional restrictions, after the second surgery. Employer moved for summary decision on the basis that, pursuant to *Brooks*, employer is not obligated to establish the availability of suitable alternate employment after claimant's discharge on April 23, 1992. The administrative law judge agreed with employer that *Brooks* is controlling, as it is undisputed that employer terminated claimant for reasons unrelated to his work injury; therefore, the administrative law judge stated that he would grant employer's motion for summary decision. On May 10, 2000, the administrative law

judge issued his decision granting employer's motion.

On appeal, claimant challenges the administrative law judge's denial of his motion to compel, granting of employer's motion for summary decision, and denial of additional compensation for temporary total disability. Employer responds, urging affirmance of the administrative law judge's decisions.

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. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *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). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). If the light duty job at employer's facility ceases to be available due to economic reasons, employer bears the renewed burden of establishing suitable alternate employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). If, however, employer establishes suitable alternate employment by providing claimant light-duty work which he successfully performs, but he is subsequently discharged for breaching company rules and not for reasons related to his disability, employer does not bear a renewed burden of providing other suitable alternate employment. *See Brooks,* 26 BRBS at 6. A discharge under these circumstances, however, does not exempt employer from liability for all loss of wage-earning capacity due to the work injury. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). Thus, for example, a permanent partial award based on loss in wage-earning capacity in the job provided by employer continues after the discharge. *Id.; see Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 17 (1980).

In the instant case, claimant argues that employer must demonstrate that claimant's former light duty job at employer's facility is within the additional work restrictions claimant received after his second back surgery on February 1, 1994. Assuming, *arguendo*, that claimant's former job is within his current work restrictions, claimant contends that the position would no longer establish the availability of suitable alternate employment if, after claimant's discharge, employer eliminated the job due to a reduction in force. Accordingly, claimant challenges the administrative law judge's denial of his motion to compel the

discovery of whether employer eliminated claimant's former position. Moreover, claimant challenges the administrative law judge's decision to grant employer's motion for summary decision, contending that the continued suitability of claimant's former light duty position and whether the position remains available are unresolved issues of material fact.

The purpose of the summary decision procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3-4 (1990); 29 C.F.R. §§18.40, 18.41. Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the administrative law judge must draw all reasonable inferences in favor of the party opposing the motion. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of a genuine issue of material fact; a fact is material if it affects the outcome of the litigation. *See Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Hall*, 24 BRBS at 4. Where a genuine question of material fact is raised, the administrative law judge must hold an evidentiary hearing. 29 C.F.R. §18.41(b); 20 C.F.R. §§702.331-350.

We agree with claimant that the administrative law judge erred in granting employer's motion for summary decision, and we therefore vacate this decision. *See generally Dunn,* 33 BRBS 204. Claimant's termination for reasons unrelated to his work injury on April 23, 1992, does not extinguish claimant's entitlement to compensation for any loss of wage-earning capacity caused by his work injury. *Mangaliman*, 30 BRBS at 43 n.4. *Brooks* does not stand for the proposition that claimant's entitlement to all benefits is forfeited following a discharge for misconduct. Rather, it establishes the principle that such a job continues to be suitable alternate employment despite the discharge. Claimant's wage-earning capacity must therefore be evaluated as if he were continuing to hold that job, and employer remains fully liable for any loss in wage-earning capacity in that job. *Mangaliman*, 30 BRBS at 41-43; *see also Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). If claimant's physical condition worsens or the job is eliminated, then these facts may affect claimant's wage-earning capacity and must be considered by the administrative law judge.

We, therefore, remand the case to the administrative law judge for findings of fact. The administrative law judge must determine whether claimant's physical ability, following his second surgery, would permit him to perform his previous light duty job

with employer, and whether this position continued to exist at employer's facility after employer ceased its voluntary compensation payments on November 13, 1994. As claimant has evidence that his physical restrictions have increased and that he remains unable to perform his usual work, employer must establish the availability of suitable alternate employment within any increased restrictions claimant may have. *See generally Mangaliman*, 30 BRBS 41-43. For example, employer may establish that the light duty job that claimant performed prior to his termination remains a viable job at its facility and is within claimant's restrictions. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Darden*, 18 BRBS 224. Claimant's termination for violating employer's drug policy would not prevent this position from constituting suitable alternate employment. *See Brooks*, 26 BRBS at 6. If, however, this job no longer exists at the shipyard,[1] employer may establish suitable alternate employment either on the open market or by way of showing another suitable position would be available at its facility but for claimant's discharge. *See Hord*, 193 F.3d 797, 33 BRBS 170(CRT). Should the administrative law judge find that employer established suitable alternate employment, he must then determine claimant's loss in wage-earning capacity due to the work injury. 33 U.S.C. §§908(c)(21), (h); *Mangaliman*, 30 BRBS at 43. The fact that claimant's actual earnings in his previous job may equal to his pre-injury earnings is not dispositive, as Section 8(c)(21) focuses on wage-earning capacity. *Id.*

[1]Insofar as claimant sought from employer pertinent evidence of claimant's post-injury wage-earning capacity, we agree with claimant that the administrative law judge erred by denying claimant's motion to compel discovery of whether employer had eliminated claimant's former light duty position. *See generally Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990).

Accordingly, the administrative law judge's Order Denying Motion to Compel and the Decision and Order Denying Claim are vacated, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge