

KEVIN STOOT )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 WEEKS MARINE, INCORPORATED ) DATE ISSUED: 11/24/2009  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Request for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Corey M. Fitzpatrick, Metairie, Louisiana, for claimant.

Christopher J. Field (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order on Request for Reconsideration (2008-LHC-1579) of Administrative Law Judge Patrick M. Rosenow 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).

Claimant began working for employer in 2000 in New Jersey as a shoreman. Over the years, claimant received promotions until he became a fill placer and dozer operator. He worked for employer in a number of states, including Maryland, where he injured his shoulder on June 20, 2007. Although he did not see a doctor until October 12 or 13, 2007, claimant was assigned to light-duty work from June 21 through December 13,

2007, and he did not lose any time from work except for the time needed to see the doctor. On December 13, 2007, employer fired claimant. Claimant filed a claim for benefits, arguing that he is entitled to disability benefits because employer did not identify additional suitable alternate employment after he was terminated from light-duty work and that he also suffered a work-related wrist injury. The administrative law judge found that claimant's work-related injury was limited to his shoulder and that his termination was not related to his shoulder injury. Therefore, he found that claimant suffered no work-related loss of wage-earning capacity and is not entitled to benefits. Decision and Order at 26-28. The administrative law judge denied claimant's motion for reconsideration. Claimant appeals,<sup>1</sup> and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in placing the burden on him to establish that his termination from work was the result of his injury or, alternatively, in finding that employer showed "good cause" and satisfied its burden to show that the termination was not injury-related. Additionally, claimant contends the administrative law judge erred in creating a reason for employer's termination of claimant. Thus, claimant argues that, as employer has not established the availability of suitable alternate employment, he is entitled to total disability benefits.

Once a claimant has established a *prima facie* case of total disability by showing that he cannot return to his usual work, as here, the burden shifts to the employer to establish the availability of suitable alternate employment. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4<sup>th</sup> Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988). If suitable alternate employment at the employer's facility becomes unavailable to the claimant for reasons other than the claimant's misconduct, the employer is required to re-establish the availability of additional suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4<sup>th</sup> Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4<sup>th</sup> Cir. 1999). However, if the alternate employment becomes unavailable to the claimant because of his own misconduct, the employer need not identify additional alternate employment, as a claimant is not entitled to total disability benefits when the loss of wages is due to actions within his control. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4<sup>th</sup> Cir. 1993); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980), *vacated and remanded mem.* 642 F.2d 445 (3<sup>d</sup> Cir. 1981), *decision following remand*, 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

---

<sup>1</sup>The administrative law judge found there was no work-related wrist injury, Decision and Order at 27, and this finding has not been appealed.

In this case, it is undisputed that claimant was on light-duty work after his shoulder injury and that he was fired from that light-duty employment on December 13, 2007. Claimant states that he had no loss of wage-earning capacity while he worked the light-duty job. Cl. Brief at 1. Employer's personnel director for the dredging division and corporate equal employment opportunity officer, Mr. Ramos, testified that he fired claimant for not doing his job, for sleeping on the job, and for making the work site uncomfortable for his fellow employees by tape recording them.<sup>2</sup> Tr. at 107, 134; *see also* Cl. Ex. 7; Emp. Ex. 5.<sup>3</sup> He stated that he talked to claimant's project managers and that two supervisors and a co-worker reported that they had seen claimant sleeping on the job. Mr. Ramos testified that neither claimant's injury nor his dormant EEO claim played any role in his decision to terminate claimant's employment. Tr. at 132-133, 154. Another co-worker testified that he saw claimant sleeping on the job "maybe 10 times" and he recalled one instance where claimant backed away and refused to assist lifting some wood and one instance where claimant left some maintenance for the day shift when he should have completed it on the night shift. Emp. Ex. 7; Emp. Ex. 8 at 34, 44.

Claimant testified that he could physically perform his light-duty work. Tr. at 82. He stated that he had never been written up or reprimanded about any of the behavior for which he was allegedly fired. He also stated that everyone took catnaps during down time, and no one woke him up to tell him he was sleeping. Tr. at 44, 54, 84. Mr. Ramos acknowledged that claimant did not have any reprimands or warnings in his personnel file. Tr. at 149. Claimant also testified that there were times when he refused to work, but that was to protect his shoulder/arm, and that although he bought the tape recorder, he never used it. Tr. at 54, 73. One co-worker testified that he thought claimant received good job reports and that he did not know of any specific instances where claimant slept on the job or did not perform his job. Cl. Ex. 10 at 13, 29-30.

The administrative law judge found that the evidence does not entirely corroborate employer's assertions that it fired claimant for failure to perform his job and sleeping on the job. Specifically, he found that while claimant did sleep on the job, he was not the only employee to do so. Also, the administrative law judge found that claimant had some bad days but none bad enough to warrant a reprimand, and that he carried a tape recorder but had not been told he could not do so. Thus, the administrative law judge concluded

---

<sup>2</sup>Claimant testified that he believed his co-workers were not following through or were being dishonest about things they were telling him, so he bought a tape recorder. Tr. at 73.

<sup>3</sup>Employer's records indicate that claimant was fired for willful misconduct, poor job performance, insubordination, poor attitude, and violating company policy. Cl. Ex. 7; Emp. Ex. 5.

that, absent any history of disciplining claimant for the infractions, sleeping on the job, not performing his job, and carrying a tape recorder “were not the primary reasons[s] he was fired.” Decision and Order at 25. However, the administrative law judge found that “the record is equally clear that Claimant was not fired for any reason related to his injury or his claim.” *Id.* at 26. He determined that the record contains no indication that claimant was unable to perform his work because of his injury, and he found that claimant was not “particularly credible,” but “his statement that he physically could still do the job was probative.” *Id.* The administrative law judge then found that the record establishes that claimant was a difficult employee, as he had a history of complaining and he had trouble dealing with his co-workers. The administrative law judge stated that although claimant carried a tape recorder, slept on the job, and did not perform his job well at times, “the most reasonable view of the evidence is that Employer just wanted to rid itself of an employee who was more trouble than he was worth, and his physical abilities were not a factor in that assessment.” *Id.* As the job continued to exist after claimant’s termination, and employer later offered to rehire claimant, accommodating his restrictions, the administrative law judge also concluded that claimant was not laid off for economic reasons. Thus, he found that claimant suffered no loss of wage-earning capacity as the result of his shoulder injury and is not entitled to disability benefits. On claimant’s motion for reconsideration, the administrative law judge rejected the assertion that he misplaced the burden of proof on claimant. Rather, the administrative law judge stated that the record clearly established that employer carried its burden of showing that claimant’s firing was not related to his injury. Decision and Order on Recon. at 2.

We cannot affirm the administrative law judge’s denial of benefits as it does not apply the proper legal analysis. In *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT), the claimant was provided suitable alternate employment at the employer’s facility that was within his medical restrictions. Thereafter, he was fired from this job on the basis that he falsified his employment application. The court affirmed the Board’s holding that the claimant was not entitled to benefits as he was terminated from suitable alternate employment due to his own misconduct and for reasons unrelated to his work injury. *See also Walker*, 19 BRBS at 173 (fired for claiming another employee’s work as his own); *Harrod*, 12 BRBS 10 (fired for bringing a handgun on the employer’s premises). To the contrary, in cases involving terminations from suitable alternate employment for reasons other than claimant’s misconduct, such as a claimant’s injury, an economic layoff, or other reasons beyond the claimant’s control, the employer must demonstrate the availability of suitable alternate employment anew in order to avoid liability for total disability benefits. *Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *Hord*, 193 F.3d 797, 33 BRBS 170(CRT). Thus, the relevant factor for ascertaining whether an employer bears this renewed burden is whether it terminated the claimant’s employment because of his own misconduct.

In this case, claimant was terminated from light-duty suitable alternate employment. Claimant argues that upon terminating him without “good cause,” employer withdrew suitable alternate employment and had the burden of re-establishing the availability of suitable alternate employment or paying him total disability benefits. As discussed above, however, the relevant standard does not involve whether employer had “good cause” for terminating a claimant but rather whether claimant’s termination was related to his own misconduct such that employer was not required to re-establish the availability of suitable alternate employment. *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT). We are unable to affirm the administrative law judge’s decision here because he relied on a finding that the evidence supports the conclusion that claimant’s termination was not related to his work injury.<sup>4</sup> Claimant’s termination need not be due to his work injury in order for employer to bear the burden of establishing the availability of suitable alternate employment after claimant’s termination. *Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (employer bore renewed burden after economic layoff). The proper inquiry is whether claimant was terminated for misconduct. The administrative law judge found employer’s evidence only partially credible in this regard, concluding that claimant’s misconduct was not “the primary reason” he was fired, and he also found that employer “just wanted to rid itself” of a troublesome employee.

We vacate the denial of benefits and remand this case for the administrative law judge to apply the proper legal standard. The administrative law judge must determine whether claimant was fired from his light-duty job because of his own misconduct. *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT). If so, then employer is under no obligation to re-establish the availability of suitable alternate employment for claimant. If the administrative law judge finds that claimant was terminated from his employment for reasons other than his own misconduct, then employer is obligated to identify additional suitable alternate employment in order to avoid liability for total disability benefits. *Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *Hord*, 193 F.3d 797, 33 BRBS 170(CRT). In this regard, there is testimony from claimant that employer offered to rehire him in a light-duty suitable job at some time after his December 2007 termination. If the administrative law judge determines on remand that employer must re-establish the availability of suitable alternate employment, he must assess whether this offer satisfies employer’s renewed burden and address any remaining loss of wage-earning capacity issues that may arise.

---

<sup>4</sup> This finding is more applicable to a Section 49, 33 U.S.C. §948a, discrimination inquiry. Section 49 of the Act prohibits an employer from discriminating against a claimant because of his workers’ compensation claim or injury. No Section 49 argument has been raised in this case. See *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

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

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge