

BRB No. 99-0723

ISAAC L. LAMB)
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 Claimant-Petitioner)
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 v.)
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 METRO MACHINE CORPORATION) DATE ISSUED:
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-2852) of Administrative Law Judge Daniel A. Sarno, Jr., 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, a rigger, injured his back at work on January 23, 1993. Employer voluntarily paid claimant temporary total disability benefits from January 25, 1993, to October 31, 1993, and September 6, 1994, to October 9, 1994, and temporary partial disability benefits from November 1, 1993, to January 23, 1994. Claimant returned to work for employer in July 1994 in a light duty capacity. On March 23, 1997, claimant was laid off from his light duty job in employer's facility. Claimant

obtained a new job with a different employer on July 14, 1997, but returned to work for employer on August 14, 1997. Claimant was laid off a second time on August 21, 1997, but returned to work for employer from November 17, 1997, to May 8, 1998, when he was laid off a third time. Claimant was recalled by employer on May 29, 1998, and has worked for employer since that time. Claimant sought total disability benefits for the periods he was laid off from employer's facility and not working, as well as partial disability benefits for the period he was laid off from employer's facility but was working for a different employer at a lower rate of pay.

The administrative law judge found that claimant established his *prima facie* case of total disability and that employer established the availability of suitable alternate employment by providing claimant a light duty job in its facility even though claimant was out of work at times due to economic layoffs. Thus, the administrative law judge denied claimant the disability benefits he was seeking since he found that any loss in claimant's wage-earning capacity during the layoffs was due solely to a downturn in the ship repair business, and therefore unrelated to claimant's work injury.

Claimant's sole contention on appeal is that he is entitled to disability compensation during the periods he was laid off from his light duty position in employer's facility. Employer responds in support of the administrative law judge's denial of additional disability benefits.

Where claimant has established that he is unable to perform his usual employment duties due to a work-related injury, as here, 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); See *v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT)(4th Cir. 1994); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); see also *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by offering claimant a light duty position in its facility. See *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 claimant is laid off from a suitable post-injury light duty job within employer's control, for reasons unrelated to any actions on his part, the burden remains with employer to show the availability of other suitable alternate employment, if employer wishes to avoid liability for total disability. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In light of the holdings of the United States Court of Appeals for the Fourth Circuit in *Hord*, 193 F.3d at 797, 33 BRBS at 170 (CRT), and of the Board in *Mendez*, 21 BRBS at 22, we agree with claimant that the administrative law judge's denial of his claim for compensation during the periods of the layoffs cannot be affirmed. The administrative law judge found that employer established the availability of suitable alternate employment by providing claimant with a suitable light duty job within his restrictions in its facility from which claimant was laid off three times for economic reasons unrelated to his work injury.¹ Contrary to the

¹The administrative law judge erred in relying in part on the statement in *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49, 52 (1991), that employer is not "a long-term guarantor of employment," since the Board's decision in *Edwards* was subsequently reversed by the United States Court of Appeals for the Ninth Circuit in *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994). Additionally, the administrative law judge erred in relying on a statement in *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 658 (1979), that employees "must take chances on unemployment like anyone else," as that case did not involve the issue of whether employer established the availability of suitable alternate employment. See Decision and Order at 6.

administrative law judge's determination, however, when, as here, employer provides claimant with a light duty job at its facility but then lays him off for economic reasons, it cannot rely on this job to meet its burden of establishing suitable alternate employment because it has made the alternate work unavailable, and claimant is totally disabled unless the employer provides evidence of other suitable jobs.² See *Hord*, 193 F.3d at 797, 33 BRBS at 170 (CRT); see also *Mendez*, 21 BRBS at 25.

We therefore vacate the administrative law judge's finding that employer established the availability of suitable alternate employment by providing claimant a light duty job in its facility during the periods of claimant's layoffs, and we remand the case for further consideration. See *Hord*, 193 F.3d at 797, 33 BRBS at 170 (CRT); *Mendez*, 21 BRBS at 22. On remand, the administrative law judge must determine whether employer established the availability of suitable alternate employment during the layoff periods based on Ms. Byers' 1997 and 1998 vocational rehabilitation reports. See Emp. Ex. 9. If the administrative law judge finds that Ms. Byers' reports establish the availability of suitable alternate employment on the open market for these periods, the administrative law judge may award partial disability benefits for the periods claimant was laid off and not working if claimant sustained a loss in his wage-earning capacity. 33 U.S.C. §908(c)(21), (h). If Ms. Byers' reports do not establish the availability of suitable alternate employment on the open market, claimant is entitled to total disability benefits for the two periods when claimant did not obtain work after being laid off from his light duty job in employer's facility. *Hord*, 193 F.3d at 797, 33 BRBS at 170 (CRT). Additionally, the administrative law judge should determine if claimant is entitled to

²Contrary to employer's argument in its response brief, the holding in *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), is distinguishable from the holdings in *Hord* and *Mendez* since, in the former case, claimant was discharged from his light duty job in employer's facility due to actions on his part. See Emp. Br. at 10, 14. The holding in *Suppa v. Lehigh Valley Railroad Co.*, 13 BRBS 374 (1979), also is distinguishable from the holdings in *Hord* and *Mendez* as in *Suppa*, claimant did not establish his *prima facie* case of total disability and the burden to establish suitable alternate employment thus did not shift to employer.

partial disability benefits for a loss in wage-earning capacity during the time he was laid off from July 14, 1997 to August 13, 1997, but was working 30-35 hours per week for a different employer. See Cl. Exs. 6, 7; Emp. Ex. 9.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge