BRB No. 97-1437

CARL HORD	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Robert A. Rappaport and Dana Adler Rosen (Knight, Clarke, Dolph & Rapaport, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1726) of Administrative Law Judge Fletcher E. Campbell, 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 if they 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).

On October 25, 1992, claimant sustained a crush injury to his left hand and arm while working as a second-class machinist for employer. After undergoing surgery on March 30, 1993, and a period of physical therapy, claimant returned to light duty work at employer's facility in the latter part of 1993. He tried

unsuccessfully to return to his usual work duties wearing a wrist brace in December 1994, but was required to return to light duty work. On March 27, 1995, Dr. Aulicino, claimant's treating physician, imposed permanent restrictions. Claimant continued to perform light duty work for employer within those restrictions until March 18, 1996, at which time he was laid off due to a reduction-in-force. Employer voluntarily paid claimant various periods of temporary total and temporary partial disability compensation. In addition, employer voluntarily paid claimant permanent partial disability compensation under the schedule for a 20 percent impairment consistent with Dr. Aulicino's disability assessment. Claimant, who was called back to work for employer on May 6, 1996, sought permanent total disability compensation during the period of the layoff.[1] Moreover, claimant asserted that he was entitled to permanent partial disability compensation under the schedule in excess of Dr. Aulicino's 20 percent impairment rating to account for the economic effects of his injury.

In a Decision and Order dated June 18, 1997, the administrative law judge denied the compensation claimed during the period of the lay-off based on his determination that employer had met its burden of establishing the availability of suitable alternate employment. In addition, the administrative law judge held that inasmuch as *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268 (1980), mandates that disability compensation under the schedule is to be calculated based solely on the employee's physical impairment, claimant was not entitled to permanent partial disability compensation beyond that which he had been paid previously.

On appeal, claimant argues that the administrative law judge erred in denying the compensation claimed during the period of the lay-off because the suitable light duty job at employer's facility was unavailable to him during this period. In addition, claimant contends that, contrary to the administrative law judge's determination, because the Court did not hold in *PEPCO* that the extent of claimant's disability under Section 8(c) is the equivalent of a medical impairment rating, *PEPCO* in no way undermines his assertion that a person with a scheduled injury may nonetheless be disabled to a greater degree than is reflected by the percentage of his medical impairment. Employer responds, urging affirmance.

[1]The parties stipulated that claimant's condition reached maximum medical improvement on March 27, 1995.

In the present case, as it is undisputed that claimant cannot perform his usual work due to his work injury, the burden shifted to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. In order to meet its burden, employer must demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical capacity and restrictions, is capable of performing and could secure if he diligently tried. *See v. Washington Metropolitan Area Transit Authority,* 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT)(4th Cir.1994); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet its burden of showing suitable alternate employment by offering claimant a job which he can perform within its own 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). In order for such a job to constitute suitable alternate employment, however, the job must be actually available to claimant. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989).

We agree with claimant that the administrative law judge's denial of his claim for total disability compensation during the period of the layoff cannot be affirmed. After noting that it was undisputed that claimant could not perform his usual work, the administrative law judge found that employer had met its burden of establishing the availability of suitable alternate employment by providing claimant with a suitable light duty job within his restrictions at its facility from which claimant was laid off for economic reasons unrelated to his work injury. Contrary to the administrative law judge's determination, however, where, as here, an 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. *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985). *See Newport News Shipbuilding & Dry Dock Co. v. Cole*, 120 F.3d 262 (Table), No. 96-2535 (4th Cir. Aug. 12, 1997).[2]

[2]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 unpublished decision in *Cole,* which was cited by claimant in his brief, is readily available to both parties. Inasmuch as *Cole* is factually indistinguishable from this

case, and there is no other published circuit court decision specifically addressing *Mendez*, it is consistent with the court's rule to cite it in this case.

The administrative law judge found that *Mendez* was distinguishable from the present case in that in *Mendez,* the claimant was not laid off as part of a general economic slowdown but rather because no light duty work was available within his particular restrictions.[3] Claimant correctly asserts that in so concluding, the administrative law judge construed *Mendez* too narrowly. This distinction is not material; the cases are alike in that a job at the employer's facility within claimant's restrictions was withdrawn from claimant through no fault of his own, and this fact controls the result. In *Cole,* the Fourth Circuit specifically discussed the Board's decision in *Mendez* and held that where the employer has eliminated the suitable alternate position entirely for economic reasons, it has made that job unavailable, and thus may not rely on that position to carry its burden of establishing suitable alternate employment. *Cole*, slip op. at 7.

The administrative law judge also found *Mendez* distinguishable based on the fact that claimant had worked for employer for approximately one year prior to being laid off. This attempt to distinguish *Mendez*, however, is also not persuasive; in *Cole*, the claimant had similarly worked for the employer for more than one year prior to being laid off. Because the light duty job at employer's facility became unavailable to claimant due to the general economic lay off at its facility and employer did not attempt to demonstrate other suitable alternate opportunities available to claimant, the administrative law judge's denial of claimant's claim for disability compensation during the period of the layoff is reversed, and his Decision and Order is modified to reflect claimant's entitlement to permanent total disability

[3]The administrative law judge also found that because the claimant here had been laid off as part of a general economic layoff, the present case was more like *Suppa v. Leigh Valley Railroad Co.,* 13 BRBS 374 (1981), and *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 1539 (1994), than *Mendez*. *Suppa* and *Edwards*, however, are distinguishable from this case in that in *Suppa* the claimant was performing his usual work at the time he was laid off; thus, claimant had not established a *prima facie* case, placing the burden of showing suitable alternate employment on employer. In *Edwards*, the claimant was working for another employer. The Board's decision in *Edwards,* moreover, was reversed by the United States Court of Appeals for the Ninth Circuit. Although the administrative law judge also found the present case more compelling for employer than *Mendez*, *Edwards*, or *Suppa*, in that the layoff here lasted only 7 weeks whereas it was permanent in *Mendez,* lasted 10 months in *Edwards*, and 6 ½ months in *Suppa*, the fact remains that regardless of the length of the layoff, the suitable alternate job at employer's facility was unavailable to the claimant during that time.

compensation during this period from March 18, 1996 through May 5, 1996.[4]

We next direct our attention to claimant's argument that the administrative law judge erred in refusing to augment his scheduled award of permanent partial disability benefits to account for the economic effects of his injury. Claimant contends that the administrative law judge's conclusion that such an award is precluded by *PEPCO*, is erroneous, as *PEPCO* dealt solely with the issue of whether an employee suffering from a permanent partial disability falling within the schedule may elect to pursue a claim under Section 8(c)(21) and the Court did not hold that disability under the schedule is the same as medical impairment. Claimant also points out that with the exception of Section 8(c)(13)(E) and (c)(23), 33 U.S.C. §908(c)(13)(E), (c)(23)(1994), enacted by the 1984 Amendments, the schedule contains no provisions which require that disability assessments be premised on permanent impairment. Claimant argues that the enactment of these provisions demonstrates that impairment is not, unless specifically delineated as such, the direct equivalent of disability.

Claimant's arguments are rejected in light of *Gilchrist v. Newport News Shipbuilding & Dry Dock Co*, 135 F.3d 915 (4th Cir. 1998), wherein the United States Court of Appeals recently considered and rejected the same arguments which claimant raises on appeal. In *Gilchrist*, the court held that although *PEPCO* does not specifically address the question of whether claimant's loss of wage-earning capacity may be considered in assessing the extent of his disability under the schedule, in spirit *PEPCO* precludes the calculation which claimant seeks. In so concluding, the court noted that a contrary ruling would permit claimant to benefit from both the presumptive disability period created by the schedule, and from demonstrating a lower wage-earning capacity like that required under Section 8(c)(21), a result deliberately barred by the Court in *PEPCO*. *Id.* at 919. Moreover, the court rejected claimant's argument that the provisions enacted by the 1984 Amendments demonstrate Congressional intent to distinguish between disability and impairment except where the statute deliberately equates them, concluding that the Amendments instead evidence Congress's continued declination to grant recipients of scheduled awards greater relief for demonstrated economic loss. *Id*. Inasmuch

[4]In light of our determination that employer did not meet its burden of establishing the availability of suitable alternate employment during the period of the layoff, we need not address claimant's alternate argument that he exhibited due diligence but was nonetheless unable to secure alternate work.

as *Gilchrist* is dispositive in this case, which arises within the jurisdiction of the Fourth Circuit, we reject claimant's arguments and affirm the administrative law judge's determination that claimant's entitlement to compensation under the schedule is limited to his undisputed 20 percent permanent impairment which employer had voluntarily paid him.

Accordingly, the administrative law judge's denial of compensation during the period claimant was laid off at employer's facility is reversed, and his Decision and Order is modified to reflect claimant's entitlement to permanent total disability benefits during this period. In all other respects, the administrative law judges' Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge