BRB No. 98-1419

KERRY DeGRAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAY SHIPBUILDING COMPANY	)	DATE ISSUED: July 26, 1999
	)	
and	)	
	)	
SENTRY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Holly Lutz, Wausau, Wisconsin, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-2287) of Administrative Law Judge Robert G. Mahony 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a welder, injured his right shoulder on May 9, 1995, during the course of his

employment for employer. Claimant underwent an arthroscopy and right shoulder reconstruction, and thereafter returned to light-duty work for employer as a welder on March 15, 1996. Claimant was laid-off from this position on June 21, 1996, as part of a company-wide reduction-in-force. His employment was terminated on July 19, 1996, pursuant to employer's absenteeism policy requiring excused absences.[1] As a result of his termination, claimant was not rehired by employer in September 1996 when employer recalled its welders. Claimant sought benefits under the Act for permanent total disability or, alternatively, permanent partial disability compensation commencing from July 19, 1996. Tr. at 13-14.

In his Decision and Order, the administrative law judge found that claimant cannot return to his pre-injury employment duties with employer, and that the light-duty welding position claimant performed from March 15, 1996, to June 21, 1996, established the availability of suitable alternate employment. Next, the administrative law judge determined that claimant's termination by employer in July 1996 was not caused by the work injury but, rather, was due solely to claimant's failure to comply with employer's absenteeism rule. Accordingly, as employer's light-duty welding position paid the same wages as claimant earned prior to his work injury, the administrative law judge denied claimant's claim for compensation benefits as of July 19, 1996.[2]

On appeal, claimant challenges the administrative law judge finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of realistic 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. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Ridgely v. Ceres, Inc*., 594 F.2d 1175, 9 BRBS 948 (8th Cir. 1979); *American Stevedores v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). Employer can satisfy its burden of establishing suitable alternate employment where it has secured a single job offer for claimant,

[1]Between March 15, and June 21, 1996, claimant had nineteen unexcused absences.

[2]Employer was ordered to reimburse claimant $782 for chiropractic treatment.

either in its own facility or with another employer, and claimant is capable of performing the offered job. *See Shiver v. United States Marine Corp, Marine Base Exchange*, 23 BRBS 246 (1990). Moreover, where 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 v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992).

Claimant contends that the light-duty welding position employer provided from March 15, 1996, to June 21, 1996, did not establish the availability of suitable alternate employment because he missed work nineteen times due to the sequela of his work injury during that three month period, he was fired due to the work injury, and employer refused to rehire him in September 1996 because of his inability to perform the position. We disagree. In addressing this issue, the administrative law judge credited the testimony of Cheryl Langreder, an occupational nurse, that claimant's job duties were within the March 25-26, 1996, functional capacities examination claimant underwent at St. Vincent's Hospital. Tr. at 92. This examination imposed a sixty pound lifting restriction. CX 1- E 3. Moreover, although Dr. Mjos added a restriction against climbing, claimant testified that he was not required to climb. CX 1-F 2, F 3; Tr. at 25. As the administrative law judge's findings are supported by substantial evidence and rational, we affirm the administrative law judge's determination that the light-duty welding position employer provided claimant was suitable and within his work restrictions. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988).

Moreover, we reject claimant's contention that claimant was terminated by employer due to the work injury. In the instant case, it is uncontroverted that claimant had nineteen unexcused absences during the three month period he performed light-duty welding for employer. CX 9-C. The administrative law judge credited evidence of employer's work rule allowing termination after four unexcused absences, claimant's awareness of the rule, and his failure to comply with the rule. *See* Decision and Order at 16-17. Accordingly, as we find that substantial evidence supports the administrative law judge's finding that claimant's termination on July 19, 1996, from the post-injury welding position is due to his own misfeasance in violating a company rule, we affirm the administrative law judge's finding that this position constituted suitable alternate employment, *see Shiver*, 23 BRBS at 246, and his consequent denial of benefits subsequent to July 19, 1996. *See Brooks*, 2 F.3 64, 27 BRBS 100 (CRT).[3]

[3]We reject claimant's contentions that he is entitled to benefits for permanent partial disability while working for employer, and permanent total disability

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

compensation after being laid off on June 21, 1996, as these contentions were not raised before the administrative law judge and are raised for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997).