BRB No. 98-970

WILLIAM D. SMITH	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
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.

Robert E. Walsh (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-300) 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 former structural welder, suffers from right thoracic outlet syndrome, carpal tunnel syndrome, and degenerative arthritis due to a work injury which occurred on April 13, 1987. Employer voluntarily paid claimant compensation for various periods of time subsequent to the work accident. Claimant sought temporary total disability benefits for several days in September 1996, after being "passed out" of his post-injury light duty job in employer's ring module shop. On those dates, no light duty work in employer's facility was available to claimant because of a lack of material.[1] The administrative law judge denied claimant additional compensation as claimant failed to establish his *prima facie* case of total disability. Assuming, *arguendo*, that claimant established his *prima facie* case of total disability, the administrative law judge found that claimant nevertheless would not be entitled to additional compensation for the "pass out" periods as employer established the availability of suitable alternate employment.

Claimant's sole contention on appeal is that he is entitled to temporary total disability compensation while he was "passed out" of his light duty position in employer's facility on September 13, 16, 20, 23 and 24, 1996, as the administrative law judge erred in determining that employer established the availability of suitable alternate employment on these days. Employer responds in support of the administrative law judge's denial of additional benefits to claimant.

In order to establish a *prima facie* case of total disability, claimant must establish that he cannot perform his usual employment; claimant's usual employment is that which he was performing at the time of the injury. *Manigault v. Stevens Shipping Co.,* 22 BRBS 332, 333 (1989). Where claimant has established that he is unable to perform his usual employment duties due to a work-related injury, 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 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 so long as the position is tailored to claimant's physical restrictions, and the job is

[1]The "pass out" was made in accordance with the union contract, article 15, section 5, which allows employer to "pass out" employees for up to three shifts without pay where there is a lack of material or ship movement.

necessary and profitable to employer's business. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where 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, and demonstrates that he remains physically unable to perform his pre-injury job, the burden remains with employer to show the availability of new suitable alternate employment, if employer wishes to avoid liability for total disability. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Wilson v. Dravo Corp.,* 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In determining that claimant did not establish his *prima facie* case of total disability, the administrative law judge noted the parties' agreement that claimant cannot return to his former employment as a structural welder. Decision and Order at 4. The administrative law judge found, however, that claimant did not establish that it is because of his injury that he could not perform his pre-injury employment during the periods at issue. The administrative law judge reasoned that even if claimant had been working at his pre-injury job, he still would have been passed out for the periods at issue because all employees in claimant's former department, the X-18 department, were "passed out" during these two periods.

We reverse the administrative law judge's finding that claimant did not establish his *prima facie* case of total disability based on the parties' stipulation, which the administrative law judge accepted, that on the dates at issue, claimant was unable to perform his full pre-injury duties. Decision and Order at 2-4. Because the parties agreed that claimant cannot return to his former employment, it is irrelevant that had he not been injured, he still would have been subjected to these two "pass outs." Consequently, we address the administrative law judge's finding that assuming, *arguendo*, that claimant established his *prima facie* case of total disability, employer established the availability of suitable alternate employment.

In determining that employer established suitable alternate employment and thus that claimant is not entitled to additional compensation, the administrative law judge relied on the Board's decision in *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), that "[t]he fact that claimant was laid off due to this work force reduction did not impose upon the employer the responsibility of identifying new suitable alternative employments, as an employer is not a long-term guarantor of a claimant's employment."[2] Decision and Order at 4. However, the Board's

[2]Actually, the administrative law judge mistakenly cited *Olsen v. Triple A Machine Shops*, as the case appearing at 25 BRBS 49 (1991), but it is clear that the cite is attributable to the Board's *Edwards* case.

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), and moreover, that case involved available alternate employment on the open market rather than light duty work at employer's facility.[3]

[3]In *Edwards*, the United States Court of Appeals for the Ninth Circuit held that claimant's 11 week job as a mechanical inspector for another employer from which he was laid off because of a reduction in force did not satisfy employer's burden of establishing the availability of suitable alternate employment. *Edwards*, 999 F.2d at 1375, 27 BRBS at 83 (CRT). The court, deferring to the Director's interpretation, reasoned that employer failed to carry its burden of establishing suitable alternate employment because the short-lived employment at the other employer was not "realistically and regularly available" to Edwards on the open market. *Id.*

In light of the Board's holding in *Mendez*, 21 BRBS at 22, and the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Cole*, 120 F.3d 262 (Table), No. 96-2535 (4th Cir. Aug. 12, 1997), the administrative law judge's finding that employer established suitable alternate employment during the "pass out" periods cannot stand.[4] We agree with claimant that he is entitled to temporary total disability compensation during the five day period in which he was "passed out" of his light duty position with employer, as a "pass out" is in effect a temporary layoff. When, as here, claimant is unable to return to his usual work, and employer withdraws light duty employment at its facility for reasons unrelated to any misconduct on claimant's part, the burden to establish suitable alternate employment remains with employer if its seeks to avoid liability for total disability benefits. *Mendez*, 21 BRBS at 25. In *Mendez*, employer withdrew the opportunity for claimant to do light duty work in its facility by laying off claimant with the result that suitable alternate employment in employer's facility was no longer available. The Board affirmed the administrative law judge's finding that Mendez was totally disabled since the claimant's light duty job with employer was no longer available and as employer did not establish the availability of other suitable alternate employment.[5] *Mendez*, 21 BRBS at 25.

In *Cole,* an administrative law judge, citing *Mendez*, awarded claimant benefits

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[4]Pursuant to Local Rule 36(c) of the United States Court of Appeals for the Fourth Circuit, 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. Both parties have cited to the administrative law judge's published *Cole* case, *Cole v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 621 (ALJ)(1994), in their briefs, which was affirmed by the Fourth Circuit. It is likely that the parties have received a copy of the Fourth's Circuit's decision in *Cole*, as claimant's counsel in the instant case represented claimant Cole before the Fourth Circuit and as the employer in *Cole* is the same employer as here. Hence, as the Fourth Circuit's *Cole* case is factually indistinguishable from this case and there is no published Fourth Circuit decision specifically addressing the issue in question, it is consistent with the court's rule to cite it in this case.

[5]The holdings in the cases of *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980), *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980), and *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979), cited in employer's brief, are distinguishable from the holdings in *Mendez* and *Cole* as, in the former cases, claimants were discharged from their light duty jobs in employer's facility due to actions on their part. *See* Emp. Br. at 14, 15.

during a period when her light-duty position with employer was unavailable due to an economic layoff. *See Cole v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 621 (ALJ)(1994); Cl. Br. at 8; Emp. Br. at 13. In affirming the award of benefits to claimant, the Fourth Circuit specifically discussed the Board's decision in *Mendez* and held, in accordance with that decision, that in order for employer to carry its burden of establishing the availability of suitable alternate employment, employer must demonstrate that a suitable job exists. Thus, in a situation where a light duty job which has been given to claimant is no longer available due to an economic layoff, employer has made that job unavailable and thus may not rely on that position to demonstrate that a suitable alternate job exists. *See Cole,* slip op. at 7.

In the instant case, as in *Mendez* and *Cole,* light duty suitable alternate employment at employer's facility became unavailable to claimant due to a layoff, albeit temporarily, and employer did not attempt to demonstrate the availability of additional suitable alternate employment opportunities to claimant during the period of time that claimant's position was unavailable. We therefore hold that, as it is uncontroverted that employer failed to establish the availability of suitable alternate employment during the periods of claimant's "pass outs," claimant is entitled to temporary total disability compensation during the periods of these "pass outs."[6] *See Cole*, slip op at 13-15; *Mendez,* 21 BRBS at 22. The administrative law judge's denial of the claim for compensation during the periods of claimant's "pass out" is therefore reversed, and his Decision and Order is modified to reflect claimant's entitlement to temporary total disability compensation for the five days in question.

[6]Contrary to employer's contention that the "pass out" was a legitimate personnel action which is not compensable under the holding in *Marino v. Navy Exchange*, 20 BRBS 166 (1988), *Marino* is distinguishable from the instant case in that *Marino* involved the issue of whether the work injury was compensable. In the instant case, there is no dispute as to the compensability of claimant's work injury.

Accordingly, the administrative law judge's denial of compensation during the periods claimant was "passed out" of his light duty job at employer's facility is reversed, and his Decision and Order is modified to reflect that claimant is entitled to temporary total disability benefits during this period.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge