BRB No. 97-1139

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| FRANK R. FLOWERS, SR. | ) | |
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| Claimant-Petitioner | ) | DATE ISSUED: |
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| v. | ) | |
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| NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION | ) | |
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| | ) | |
| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order On Remand-Denying Temporary Partial Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Temporary Partial Disability (94-LHC-1991, 94-LHC-1992) of Administrative Law Judge Richard K. Malamphy 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).

This case appears before the Board for the second time. In 1987, claimant, a first class painter who had been employed by employer since 1977, was moved from the paint department to the dock department because of an allergic reaction to

epoxy paints used in the paint department. In June or July 1993, when claimant was sent back to the paint department because employer needed extra painters, claimant's exposure to epoxy again resulted in epoxy poisoning which cleared up in five days on medication. The company physician, Dr. Geib, examined claimant and restricted him from work around epoxy, which caused claimant to return to the dock department. On September 24, 1993, claimant was laid off due to a reduction in force in that department. Following his lay-off from employer, claimant was able to obtain only sporadic employment and thus sought temporary total and partial disability compensation under the Act.

Administrative Law Judge Malamphy denied the claim, finding that claimant was able to perform his "usual work" in the dock department, that claimant was laid-off for reasons unrelated to his job injury, and the administrative law judge thus concluded that claimant failed to establish his *prima facie* case of total disability.

Claimant appealed to the Board, contending that his usual employment for purposes of establishing his *prima facie* case was his pre-injury work in the paint department. The Board reversed the administrative law judge's finding that work in the dock department constituted claimant's usual employment and held that claimant established a *prima facie* case of total disability by proving that he was unable to perform his pre-injury work in the paint department. The Board remanded the case to the administrative law judge specifically to consider all relevant evidence regarding the issue of suitable alternate employment, including the testimony of employer's vocational rehabilitation specialist, Barbara Byers. *Flowers v. Norfolk Shipbuilding & Dry Dock Corp.*, BRB No. 96-531 (Nov.19, 1996)(unpub).

On remand, the administrative law judge again denied benefits, finding that claimant's job in the dock department constituted suitable alternate employment, and that the layoff was not occasioned by claimant's work injury.[1] The administrative law judge therefore did not address any other evidence regarding suitable alternate employment. Claimant again appeals, contending that the administrative law judge erred in finding suitable alternate employment established

[1] On remand, the administrative law judge reasoned that although claimant was not officially restricted from the paint department until some two months prior to his lay-off, claimant's initial transfer to the dock department stemmed from his epoxy poisoning. The administrative law judge concluded that inasmuch as claimant spent nearly six years working in employer's dock department, as a first class painter, with no evidence of epoxy poisoning, employer established suitable alternate employment.

at employer's facility as claimant's layoff made the job unavailable to him. Employer responds, urging affirmance.

Claimant's sole contention on appeal is that the administrative law judge erred in permitting employer to rely on a position in its dock department which is no longer available to claimant by virtue of his lay-off. Once claimant establishes that he is physically unable to return to his pre-injury employment, the burden shifts 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); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

Claimant correctly argues, on the facts of this case, that employer's lay-off of claimant makes the job in the dock department unavailable to him. We must, therefore, vacate the administrative law judge's finding that suitable alternate employment is established. In this regard, we reject the administrative law judge's finding that *Mendez*, 21 BRBS at 22, is inapplicable to the instant case, as the administrative law judge construes *Mendez* too narrowly. The administrative law judge stated that *Mendez* stands for the proposition that employer cannot rely on a position in its facility as suitable alternate employment when a single employee is laid off because there is no longer "light duty" work for him. The administrative law judge attempted to distinguish the present case by finding that claimant did not perform "light duty" work, *i.e.*, claimant worked as a first-class painter in the dock department performing regular duties for six years prior to his lay-off, except for the brief return to the paint department. "Light duty" work, however, was simply the type of suitable alternate work of the claimant in *Mendez.* The holding in that case is not limited to suitable work with fewer physical requirements, but also includes alternate work within whatever physical restrictions the claimant has. The administrative law judge attempted to further distinguish the present case by pointing out that unlike the single employee laid off in *Mendez,* claimant was not the only employee laid off as

employer was downsizing. 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.

Inasmuch as we have held that claimant's "usual" work is in the paint department, in order for employer to show suitable alternate employment within its facility, employer must have a job for claimant within his restrictions, *i.e.,* one with no exposure to epoxy. Under the circumstances of this case, therefore, by laying-off claimant from the dock department, employer cannot meet its burden of establishing suitable alternate employment with a job in this department after the layoff. Consequently, we vacate the administrative law judge's finding that employer established suitable alternate employment after September 24, 1993, and we vacate the denial of benefits. We remand this case to the administrative law judge for reconsideration of whether employer established suitable alternate employment in light of the remaining evidence of record, and claimant's due diligence in seeking such, if this issue is reached. *See generally Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991).

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.

BETTY JEAN HALL
Chief Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge