

ARNOLD SPOONER)
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 Claimant-Petitioner)
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 v.)
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 ADM/GROWMARK RIVER SYSTEM,) DATE ISSUED: Oct. 20, 2004
 INCORPORATED)
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Leonard A. Washofsky (Leonard A. Washofsky, A Law Corporation), Metairie, Louisiana, for claimant.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett, L.L.C), New Orleans, Louisiana, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-LHC-179) of Administrative Law Judge Clement J. Kennington 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 laborer working as a barge cover handler, injured his left shoulder at work on August 13, 2000. Claimant returned to work shortly after his injury but was unable to work as a barge cover handler. Employer voluntarily paid claimant temporary partial disability benefits from August 14, 2000, to August 26, 2001. The parties stipulated that claimant has a permanent physical disability and that he reached maximum medical

improvement on July 24, 2001. On September 7, 2001, claimant was terminated from employment for violating company policy regarding alcohol abuse. Claimant sought additional benefits. Subsequently, claimant obtained post-injury employment with a different employer. The administrative law judge denied claimant additional ongoing partial disability benefits after September 7, 2001, finding that employer established the availability of suitable alternate employment at its facility and that claimant did not establish a loss in his post-injury wage-earning capacity.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's decision.

Claimant initially argues that the administrative law judge erred in finding that employer established the availability of suitable alternate employment at its facility. Where, as here, claimant establishes his *prima facie* case of total disability, the burden shifts to employer to demonstrate, within the geographic area where claimant resides, the realistic availability of jobs which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet this burden by providing claimant with a suitable job at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If a claimant successfully performs a suitable alternate position but is discharged for violating company policy, the employer does not bear a renewed burden of demonstrating the availability of suitable alternate employment thereafter. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980); *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979).

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge rationally found that employer established the availability of suitable alternate employment at its facility based on claimant's testimony that he performed all work post-injury as a laborer at employment's facility with the exception of the barge cover handler position and that he would still be working in this job had he not been discharged. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.* 32 Fed. Appx. 126 (5th Cir. 2002); Decision and Order Denying Benefits at 15-16; Tr. at 81, 83. Moreover, the administrative law judge rationally found that claimant's post-injury work was within his physical restrictions. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); Decision and Order Denying Benefits at 15-16; Tr. at 41-42, 49. Because employer established the availability of suitable alternate employment at its facility and claimant was discharged from this position due to his own misfeasance, employer was not required to establish the availability of

suitable alternate employment on the open market.¹ See *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT); *Walker*, 12 BRBS 133; *Harrod*, 12 BRBS 10; *Conover*, 11 BRBS 676; Decision and Order Denying Benefits at 16-17.

Claimant next argues that the administrative law judge erred in finding that claimant did not sustain a loss in his post-injury wage-earning capacity. Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability benefits is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. See *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). Claimant's suitable post-injury job may establish that he is not economically disabled even though he continues to suffer some physical impairment as a result of his injury. *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1996).

The administrative law judge's finding that claimant sustained no loss in his post-injury wage-earning capacity is affirmed as it, too, is rational, supported by substantial evidence, and in accordance with law. The administrative law judge rationally found that claimant's post-injury earnings in his employment with employer fairly and reasonably represented his post-injury wage-earning capacity because there was no evidence to establish that claimant could not have continued earning these wages had he not been terminated. *Ward*, 31 BRBS 65; Decision and Order Denying Benefits at 14-15. The administrative law judge rationally rejected claimant's contention that his post-injury earnings did not fairly and reasonably represent his post-injury wage-earning capacity because, even though claimant could not perform the barge cover handler position, he was able to perform three other jobs which each paid a higher hourly rate than the barge handler position. See generally *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002); Decision and Order Denying Benefits at 14-15; Emp. Ex. 7; Tr. at 53-59, 82. Contrary to claimant's contention, the administrative law judge was not required to consider the open market evidence since he determined that claimant's post-injury earnings with employer fairly and reasonably represented his post-injury wage-earning capacity. See generally *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); Decision and Order Denying Benefits at 15.

¹ Contrary to claimant's contention, the Board's affirmance of an award of total disability benefits to the claimant in *Brown v. River Rentals Stevedoring, Inc.*, BRB No. 01-0770 (June 17, 2002)(unpub.), after he was discharged from an *unsuitable* job at the employer's facility due to his own misfeasance, does not mandate an award here where claimant was discharged from a *suitable* job at employer's facility.

Moreover, the administrative law judge rationally found that claimant sustained no loss in his post-injury wage-earning capacity because his earnings in his last two weeks of employment, which fairly and reasonably represented his post-injury wage-earning capacity, equaled or exceeded his pre-injury earnings. *See generally Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Mangaliman*, 30 BRBS 39; Decision and Order Denying Benefits at 15-17; Tr. at 74. The administrative law judge rationally rejected claimant's argument that he would be entitled to benefits had he not been discharged, finding that claimant was not entitled to disability benefits prior to the discharge because he did not establish that he sustained a loss in his wage-earning capacity. *See generally Mangaliman*, 30 BRBS 39; Decision and Order Denying Benefits at 15. Because we affirm the administrative law judge's findings that employer established the availability of suitable alternate employment at its facility and that claimant sustained no loss in his post-injury wage-earning capacity, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.²

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² We cannot consider Dr. Hoffman's July 7, 2003, report, which was submitted with claimant's post-hearing and appellate briefs, because it was not admitted into the record by the administrative law judge. See Cl. br. at 3; Emp. br. at 3 n. 1. Claimant may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922, if he wishes the administrative law judge to consider it. See *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).