BRB No. 96-1158

MORRISON BASS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: _____
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting a Change of Treating Physician, Denying Claims for Compensation of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting a Change of Treating Physician, Denying Claims for Compensation (92-LHC-2829) 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 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 shipfitter, sustained an axial compression injury on May 30, 1992, while in the course of his employment with employer. Subsequent to his return to work,[1] claimant was trained as a welder, and reassigned to tank testing. Claimant missed work from October 26, 1993, to November 15, 1993. HT at 51, 116, 159-160. After examining claimant on November 10, 1993, Dr. Morales returned him to work with a form detailing physical restrictions and recommending chiropractic care. HT at 53; Employer's Exhibits

[1]The parties stipulated that claimant was disabled from May 27, 1992 to August 11, 1992.

8(o), (p), 9(b). Dr. Morales testified that claimant did not request, and he did not issue, a work excuse to cover claimant's absence from work. Claimant's Exhibit 3 Depo. at 21-22. Upon claimant's return to work, employer's clinic refused to accept Dr. Morales' restrictions, and returned claimant to his tank testing job. HT at 54-56. Employer subsequently gave claimant a 5-day, in-house suspension as a result of this undocumented absence. Employer's Exhibit 12. Three subsequent absences from work, on January 12, 1994, March 30, 1994, and May 13, 1994, led to claimant's May 16, 1994 discharge by employer for undocumented absences and excessive absenteeism.

In his Decision and Order, the administrative law judge found that claimant was not entitled to any benefits subsequent to May 17, 1994. Specifically, the administrative law judge found that claimant was discharged due to violations of employer's yard rules and that the record is not persuasive that his work-related impairment played a part in the absences from work which ultimately resulted in his discharge. The administrative law judge also found that employer established the availability of suitable alternate employment at the time of claimant's May 1994 discharge; specifically, the administrative law judge determined that there was suitable work available for claimant which employer would have continued to provide to him but which was unavailable to him only by virtue of his discharge for reasons unrelated to his work injury.[2]

On appeal, claimant challenges the administrative law judge's findings that his termination by employer was unrelated to his work-related injury and that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

Claimant initially contends that he is entitled to continuing benefits based upon his discharge because his absences from work were related to his work-injury. The decision of the United States Court of Appeals for the Fourth Circuit in *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), is dispositive of the issue in the instant case. In *Brooks*, claimant falsified his employment application and pre-employment medical history. This fact was discovered after he suffered an injury at work. The claimant had returned to work for employer in light duty status, in a suitable job with no loss in actual wages, when he was terminated for falsifying his application in violation of a company rule. Claimant sought total disability compensation after his discharge, which an administrative law judge awarded. The Board reversed, however, holding that as claimant's discharge was for reasons unrelated to his disability, employer was not required to show different suitable alternate

[2]The administrative law judge also found that claimant may select Dr. Morales as his treating physician and that employer is liable for his medical treatment under Section 7 of the Act, 33 U.S.C. §907.

employment outside its facility. *Brooks,* 26 BRBS at 6. The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *Brooks*, based on the Board's reasoning. *Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT).

In the instant case, the administrative law judge found that claimant was discharged for reasons unrelated to his work-related impairment; specifically, the administrative law judge concluded that claimant was terminated due to his repeated, undocumented absences and excessive absenteeism. In this regard, the administrative law judge thus determined that the record is not persuasive that claimant's work-related impairment played a part in the absences which ultimately resulted in his discharge. Claimant's disciplinary record, as well as his acknowledged work absences, constitute substantial evidence supportive of the administrative law judge's finding that employer discharged claimant due to his violation of employer's yard rules. *See* Employer's Exhibit 12. Because the administrative law judge's findings on this issue are supported by substantial evidence, they must be affirmed. Thus, we also affirm the conclusion that claimant is not entitled to compensation for any loss in wage-earning capacity which resulted from his discharge, as employer is not required to re-establish suitable alternate employment as a result of the termination of claimant's job. *See Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT).

However, claimant asserts that the job provided by employer was not suitable alternate employment in any event, and this contention must be addressed; a post-injury job in employer's facility can constitute suitable alternate employment only if it was suitable for claimant.[3] Where, as in the instant case, claimant is unable to perform his usual employment duties as a shipfitter with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. Employer must present evidence that a range of jobs exists which are reasonably available and which the disabled employee is realistically able to secure and perform. *See 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). The employer may meet its burden of establishing the availability of suitable alternate employment by offering the employee a job in its facility so long as the position is suitable given claimant's physical restrictions, and the job is necessary to employer's business. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.,* 18 BRBS 224 (1986). In the instant case, the administrative law judge

[3]In *Brooks*, claimant did not argue that the post-injury job was not suitable for him, nor did he contend that he suffered any loss in wage-earning capacity in that job. Thus, *Brooks* establishes that where employer has satisfied its burden of showing suitable alternate employment with a job in its facility and claimant is subsequently discharged for reasons unrelated to this disability, employer does not bear a renewed burden of showing suitable alternate employment. If, however, the job was not suitable, employer has not met its burden in the first instance. Moreover, a claimant may be entitled to permanent partial disability benefits following a discharge if he had a loss in wage-earning capacity in the job provided. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

noted Dr. Morales' status as claimant's treating physician and the fact that Dr. Morales placed restrictions on claimant. He later stated:

> Claimant's counsel points out that the employer never acknowledged the restrictions assigned by Dr. Morales. However, counsel conceded that the employer had jobs within these restrictions at the time of the hearing. Testimony at the hearing reflects that jobs meeting the definition of suitable alternate employment based on the claimant's restrictions have been available at the shipyard for many years. I conclude that the record shows that as of the dismissal date in May 1994, the Employer had work available that met the restrictions assigned by Dr. Morales. The Employer would have continued to provide an adequate position for the Claimant, but for his dismissal for cause. [T]herefore, I find no basis for payment of compensation beginning May 17, 1994.

Decision and Order at 9-10. Claimant specifically argues that his duties as a tank tester were outside his restrictions as determined by Dr. Morales and thus cannot constitute suitable alternate employment. Because the administrative law judge did not make a specific finding in this regard, we vacate his finding that employer established the availability of suitable alternate employment and remand the case for reconsideration of this issue pursuant to applicable law. On remand, the administrative law judge must set forth the relevant evidence, indicating which evidence he credits or discredits and his reasons therefor.[4] *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

[4]Should the tank tester position be deemed unsuitable for claimant, employer may meet its burden by establishing the existence of other positions within its facility only if those positions were available to claimant prior to his discharge and were within claimant's restrictions. *See generally Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Employer cannot rely on positions at its facility if it refused to make any job other than tank tester available to claimant.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge