

MICHAEL L. CHAPMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED:_____
)	
and)	
)	
GENERAL DYNAMICS)	
CORPORATION)	
)	
Self-Insured)	
Employers-Respondents)	DECISION and ORDER

Appeal of the Decision and Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Richard D. Haviland (Rakosky, Smith, Miller & Papp, P.C.), New London, Connecticut, for claimant.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Bath Iron Works Corporation.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-1782, 91-LHC-1783) of Administrative Law Judge David W. Di Nardi awarding benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

On May 16, 1989, claimant injured his right wrist during the course of his employment as a shipfitter with General Dynamics Corporation . Tr. at 23-24. After surgery in July 1989 and a

recuperative absence from work, claimant returned to light duty work in October, and on November 1, 1989, he returned to regular duty. Cl. Ex. 1-3 - 1-5. Because the pain continued, claimant was placed on temporary total disability leave until November 15, 1989 when he returned to light duty work. Cl. Ex. 1-5 - 1-6. Claimant and General Dynamics stipulated that General Dynamics voluntarily paid temporary total disability benefits from May 24, 1989 through October 31, 1989 and from November 8 through November 15, 1989. Decision and Order at 3-4.

In March 1990, claimant relocated to Maine and, after a pre-employment physical and approval from his doctor, claimant began a regular duty job as a shipfitter with Bath Iron Works Corporation ("Bath Iron Works" or "employer"). Tr. at 26, 38. On July 31, 1990, while swinging a heavy hammer, claimant felt a sharp pain in his right wrist; however, he continued to work until August 15, 1990, when he reported the injury to employer's clinic. Tr. at 27; Emp. Ex. at 18-16. After claimant's doctor, Dr. Wainwright, examined claimant's wrist on August 20, 1990, he scheduled surgery for September 20, 1990. Tr. at 28; Cl. Ex. 1-6 - 1-7; Emp. Ex. 18-17. On November 20, claimant returned to light duty work with restrictions. Cl. Ex. 1-8; Emp. Ex. 18-21. In January 1991, Dr. Wainwright issued permanent work restrictions for claimant; however, he determined claimant's condition had not yet reached maximum medical improvement. Emp. Exs. 18-29, 20-2.

On January 15, 1991, claimant was reassigned to the Portland facility on loan as a firewatcher, which is light-duty work. Emp. Ex. 18-28. He continued working in that capacity at his pre-injury wages until April 1991 when he was laid off due to budget cuts and lack of work. Claimant received unemployment benefits until August 2, 1991, when he found work as a welder, and on August 28, 1991, he was laid off due to lack of work. Tr. at 29-30. One month later, on September 25, 1991, Dr. Wainwright determined that claimant has a five percent permanent partial disability of his right hand. Cl. Ex. 1-9; Emp. Ex. 30 at 29-30. Claimant was recalled by employer on October 1, 1991, but was laid off on November 1, 1991. Tr. at 30-31.

Claimant filed a claim against both employers for his work-related disability. He sought temporary total disability benefits from August 20, 1990 through November 19, 1990, and temporary partial disability benefits from November 20, 1990 and continuing. As the administrative law judge found that General Dynamics had discharged its liability for claimant's injury by voluntarily paying temporary total disability benefits in 1989, he determined that Bath Iron Works is liable as the responsible employer in the present claim. He concluded that claimant is entitled to temporary total disability benefits under Section 8(b), 33 U.S.C. §908(b), from August 20, 1990 through November 19, 1990. Further he found that, as claimant returned to work or received unemployment compensation from November 20, 1990 and continuing, claimant is not entitled to temporary partial disability benefits; however, he awarded claimant permanent partial disability benefits for a five percent impairment to the right hand from September 25, 1991 and continuing for a period of 12.2 weeks, pursuant to Section 8(c)(3), 33 U.S.C. §908(c)(3). Decision and Order at 15, 19, 21. He also awarded claimant interest, medical benefits and an attorney's fee. Decision and Order at 21. Claimant appeals the denial of temporary partial disability benefits, and Bath Iron

Works responds, urging affirmance.¹

Claimant contends the administrative law judge erred in denying temporary partial disability benefits for the period between his April 10, 1991 layoff and August 1, 1991, when he found work. He argues that the administrative law judge erroneously relied on the fact that he received unemployment compensation to determine he was not disabled at that time, and that employer did not meet its burden of establishing suitable alternate employment. Employer responds, arguing that claimant's application for and receipt of unemployment benefits constitute an admission that he is ready, willing and able to work. Alternatively, employer argues that it met its burden of establishing suitable alternate employment by providing claimant with light duty work at its facility and that claimant's subsequent layoff should not negate employer's efforts. In reaching the conclusion that claimant is not entitled to benefits between April and August 1991, the administrative law judge stated:

He was laid-off on April 10, 1991, due to a lack of work, and he collected unemployment benefits until he found employment on August 2, 1991 as a welder, earning \$545.00 weekly, at A&T Engineering in Connecticut. Claimant's filing for and receipt of unemployment benefits constitute a certification herein that he was ready, willing and able to work and, *a fortiori*, is not disabled under the Act as of April 10, 1991.

Decision and Order at 15. Claimant's challenge to the administrative law judge's finding that he was not disabled between April and August 1991 has merit.²

In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Once claimant shows he is unable to return to his usual work, employer must establish the availability of other jobs claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Id.* Employer may meet its burden by providing claimant with necessary alternate work at its facility. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Contrary to employer's argument, the Board has held that where an employer provides a claimant with light duty work at its facility but then lays the claimant off for economic reasons, the suitable alternate employment provided has been made unavailable and the claimant is totally disabled unless employer provides evidence of other suitable alternate jobs. *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985).

¹Because the administrative law judge determined that General Dynamics fully paid all benefits for which it was liable, it did not participate in this appeal.

²Because claimant's condition did not reach maximum medical improvement until September 25, 1991, claimant's disability between April 10 and August 1, 1991 was temporary. *See* Decision and Order at 14; *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985).

In this case, after claimant's second injury to his wrist, he returned to work for employer in a light duty capacity. On April 10, 1991, employer made this light duty work unavailable when it terminated claimant's employment due to budgetary constraints and lack of work. Thereafter, claimant was unable to find alternate employment until August 2, 1991. In finding that claimant was not disabled between April 10 and August 1, 1991, the administrative law judge relied on statements claimant made in his application for unemployment compensation concerning his ability to work. In so doing, the administrative law judge improperly shifted the burden to claimant to establish, in effect, that he was unemployable. *See generally Shell v. Teledyne Movable Offshore, Inc.*, 14 BRBS 585 (1981). Given that claimant's medical restrictions prevented his return to his usual work, employer's withdrawal of the light duty job at its facility again placed the burden on employer to establish the availability of suitable alternate employment for the period in question. *Mendez*, 21 BRBS at 24-25. Claimant's statements in support of his receipt of unemployment compensation regarding his ability to work do not establish his ability to return to his usual work in this case.³ Moreover, claimant's receipt of unemployment compensation is not determinative and cannot meet employer's burden of establishing suitable alternate employment once the light duty job was withdrawn. *Id.* Consequently, the administrative law judge used an improper standard under the Act to determine the extent of claimant's disability for the period between April 10 and August 1, 1991. Therefore, we vacate his finding that claimant is not disabled during that period, and we remand the case for further consideration of this issue.

³The Maine statute regarding unemployment compensation requires recipients to be "able and available for work." Me. Rev. Stat. Ann. Title 26, §1192(3). Merely because claimant is "able to work" does not indicate he can perform his usual work and is not disabled, as the administrative law judge found.

Accordingly, the administrative law judge's denial of temporary partial disability benefits for the period between April 10 and August 1, 1991 is vacated, and the case is remanded for further consideration in accordance with this decision. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge