BRB No. 97-0411

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

Appeal of the Decision and Order Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Matthew H. Kraft (Rutter & Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, 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 Denying Benefits (93-LHC-949, 94 LHC-2171) of 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 if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In 1986, while working as a welder for employer, claimant developed thoracic outlet syndrome for which he underwent a left cervical rib resection on January 5, 1987. Thereafter, Dr. Muizellaar, the physician who performed the procedure, imposed permanent restrictions regarding overhead work, climbing ladders, and lifting over 25 pounds. As a result of these restrictions, claimant was placed in a light-duty welding

position in employer's steel production facility.

After sustaining a work-related neck injury on May 27, 1992, claimant was transferred from the steel production facility to another job where he continued performing light duty welding as he had done previously. At some point prior to February 1993, while claimant was at the shipyard clinic, a woman smelled alcohol on his breath, and a breathalyzer test was performed which was positive for alcohol. At that time, consistent with the terms of Article 49, Section 6 of the collective bargaining agreement between employer and the United Steelworkers of America, EX-16, and employer's Company Rule Number 6 (Yard Rule 6), claimant was given the option of being terminated or entering alcohol rehabilitation after which he would be subjected to three random drug tests in the following year. After undergoing rehabilitation, claimant was reinstated following a June 19, 1992, drug test which was negative. Claimant's first random drug test performed on October 7, 1992 was also negative, but a second random test performed on February 15, 1993, was positive for cocaine. On February 18, 1993, after receiving confirmation of the positive results from an independent laboratory, Thomas Coleman, supervisor of employee relations for employer, called claimant in to inform him that he was being discharged for reporting to work under the influence of cocaine and that he was being suspended pending his termination. Following his termination, in April 1993 claimant underwent a cervical fusion, after which Dr. Muizellaar released him to return to work under the same restrictions he had imposed previously. On December 3, 1994, claimant secured employment at Smithfield Packing as a sanitation and cleaning worker paying $7.80 per hour.

Claimant did not allege any loss in his wage-earning capacity at any time prior to his dismissal and conceded that the light duty work he was performing at the time of his termination was within his restrictions. Tr. at 53; CX-1(b). Claimant, however, asserted entitlement to permanent total disability subsequent to his termination from February 18, 1993 until April 12, 1993, and from January 3, 1994 until December 2, 1994, and permanent partial disability benefits thereafter based on the difference between his pre-injury average weekly wage and his lower post-injury earnings at Smithfield Packing.

After considering the relevant evidence, the administrative law judge denied the claim, finding that while it was undisputed that claimant was unable to return to his usual shipfitting duties as a result of his 1986 work-related injury, employer established the availability of suitable alternate employment by providing claimant with suitable light duty work within his restrictions at its facility which claimant would still be able to perform but for the fact that he was terminated based on his violation of Yard Rule 6. In so concluding, the administrative law judge rejected claimant's argument that he had been fired without just cause, and determined that as claimant had not been treated any differently from any other similarly situated employee, his termination did not violate Section 49 of the Act, 33 U.S.C. §948a. Claimant appeals the denial of the claim, and employer responds, urging affirmance.

Claimant argues on appeal that the administrative law judge failed to properly

analyze the record evidence to determine whether employer sufficiently demonstrated the applicability of the willful misconduct line of cases exemplified by *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), and *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). In addition, claimant maintains that the administrative law judge's denial of the claim was based on application of an incorrect legal standard because he apparently believed that claimant's entitlement to compensation hinged on whether employer violated Section 49, although this issue was not raised and is, in any event, separate and distinct from the total disability issue. Claimant also argues that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. 557(c)(3)(A) (APA), by ignoring relevant evidence. Finally, claimant avers that even if the Board determines that the administrative law judge applied the correct legal standard and adhered to the requirements of the APA, his Decision and Order nonetheless cannot stand because in order to prevail employer was required to establish that claimant had engaged in affirmative misconduct which resulted in his termination and the record evidence on this issue is at best unclear.

Inasmuch as it is undisputed in the present case that claimant is unable to perform his usual work , claimant established a *prima facie* case of total disability. The burden thus shifted to employer to demonstrate the availability of suitable alternate employment. *See generally See v. Washington Metropolitan Area Transit Authority,* 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT) (4th Cir. 1994); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). Employer can meet this burden by providing claimant with a suitable light duty job within its facility. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). It is also well-established that where employer provides claimant with a suitable job and claimant is terminated for reasons unrelated to his work-related disability, employer does not bear the renewed burden of showing other suitable alternate employment. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT). In such a case, claimant is at most partially disabled, as his earnings in the suitable job may form the basis for the administrative law judge to determine claimant's wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

After review of the administrative law judge's Decision and Order in light of the relevant evidence and claimant's arguments on appeal, we affirm his denial of benefits subsequent to claimant's termination. Claimant correctly asserts that the administrative law judge erred in considering the relevant evidence in the context of a Section 49 claim, as no claim alleging Section 49 discrimination had been made. Nonetheless, we conclude that any error he may have made in this regard is harmless on the facts presented. Contrary to claimant's contention that the administrative law judge's decision does not comply with the APA, the administrative law judge considered all of the relevant evidence, including that related to the conflicting drug tests and employer's delay in notifying claimant of the positive February 15, 1993, drug test. The administrative law judge then rationally found that employer provided claimant with a suitable light duty job at its facility at his pre-injury wages which remained available to him but for the fact that he was terminated for violating Yard Rule 6. In so concluding, the administrative law judge relied on the testimony of Mr.

Coleman, employer's supervisor of employee relations, that claimant was fired because of his positive random drug test, as well as the testimony of Mr. Moore, employer's general foreman, who stated that light duty work within claimant's restrictions has been available at all times since his termination. Tr. at 61-66, 92-99. Inasmuch as the credited testimony provides substantial evidence to support the administrative law judge's determination that employer provided claimant with a suitable light duty job at its facility at his pre-injury wages which remained available to him but for the fact that he was terminated for testing positive for cocaine, his denial of claimant's claim for disability compensation is affirmed. *See Harrod*, 12 BRBS at 15-16.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge