BRB No. 02-0430

WILLIAM A. WINSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: MAR 6, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	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 (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-LHC-0469) of Administrative Law Judge 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 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 welder, suffered an injury to his lower back on July 26, 1995, when he fell backwards while lifting a welding machine; he returned to unrestricted work duties in September 1995 and performed his usual work duties until October 1996 when he left work due to increasing back pain. Claimant underwent back surgery in January 1998 and returned to work with light duty restrictions. Additional surgery was performed on March 7, 2000, and claimant was released to light duty work on October 2, 2000. Claimant, however, did not actually report to work until October 17, 2000, at which time he was discharged for failing either to report to work from October 16, 2000 or

to provide documentation supporting his failure to return to work upon release by his surgeon, as required under the terms of the union contract. *See* EXs 17, 21. Claimant sought compensation for continuing temporary total disability from October 4, 2000, the date of his discharge and termination of benefits.

In his decision, the administrative law judge found that employer had suitable work available at its facility within claimant's restrictions and that claimant's failure to follow proscribed procedures under the contract, and not claimant's work injury, was the cause of claimant's loss of wage-earning capacity. Accordingly, he denied further compensation.

On appeal, claimant contends that the administrative law judge impermissibly placed the burden upon claimant to demonstrate that the proffered employment was not suitable. Claimant also contends that the administrative law judge erred in finding that his termination was not due to his work injury. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge erred in finding employer established the availability of suitable alternate employment at its facility. Once, as here, claimant establishes his inability to perform his usual work as a result of his injury, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Employer may tailor a job at its facility to claimant's specific restrictions so long as the work is necessary to employer's operation. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden*, 18 BRBS at 226.

In finding that employer established suitable alternate employment at its facility, the administrative law judge relied upon the opinion and physical restrictions provided by Dr. Klara, claimant's surgeon.[1] In concluding that employer had work available within these restrictions, the administrative law judge specifically credited the testimony of Mr. Johnson, who oversees the work of nine shipyard supervisors, including claimant's, that employer had available a table welding position within claimant's restrictions. Mr. Johnson specifically testified that although he was unaware of anyone performing that job by standing less than two and a half hours per day, he believed that it could be done. HT at 130-132, 135.

We reject claimant's contention that the administrative law judge erred by failing to give determinative weight to his testimony that he could not perform the position described by Mr. Johnson. The administrative law judge rationally found that Mr. Johnson was aware of claimant's restrictions and credibly testified that the table welding position was available, necessary and

[1]Dr. Klara restricted claimant to no lifting over twenty pounds, no climbing or crawling, and occasional kneeling, squatting, bending, standing or twisting. The restrictions were temporary, as Dr. Klara had anticipated increasing claimant's level of activity after six months. EX 12.

amenable to claimant's restrictions. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Contrary to claimant's contention, Mr. Johnson's testimony reveals that he was aware of all of claimant's restrictions. *Compare* EX 12 *with* HT at 138. The administrative law judge did not err in discounting claimant's testimony that the job was not suitable, since claimant, by failing to report to the clinic as instructed, never attempted to perform the work. In this regard, we reject claimant's contention that the administrative law judge improperly placed the burden on him to establish the suitability of the job. Rather, the administrative law judge rationally found that the job was suitable based on Mr. Johnson's testimony and that claimant did not offer any credible evidence to refute it. As substantial evidence supports the finding of suitable alternate employment, we affirm. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Darden*, 18 BRBS 224; *see also Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Claimant next argues that the administrative law judge erred in finding that his termination was not due to his work injury. It is claimant's contention that, assuming *arguendo*, employer established the availability of suitable alternate employment within its facility, the administrative law judge's conclusion that his termination did not arise out of his work injury is in error. Claimant thus contends he is entitled to total disability benefits. Where, as in the instant case, employer establishes the availability of suitable alternate employment, and claimant is subsequently discharged by employer because of his failure to follow company procedures, any resulting loss of wage-earning capacity is not compensable since it was not due to claimant's work related injury but to his own misconduct. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980) If, however, the discharge is due to claimant's inability to perform the work or to an economic layoff, employer must establish the availability of other suitable alternate employment in order to avoid liability for total disability benefits. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

On October 2, 2000, Dr. Klara released claimant to return to work with restrictions. HT at 41-42. At this appointment, claimant was accompanied by Margaret Gray, employer's rehabilitation medical case manager nurse, who reminded claimant that his release and statement of restrictions must be taken to employer's clinic and that claimant was to report to work. HT at 106-107. Claimant, however, testified that he believed Ms. Gray would take the papers to employer's clinic and that employer would notify him if suitable work was available. HT at 44, 47, 169-170. Mr. Johnson received claimant's listed restrictions from Ms. Gray via the clinic on October 4, 2000, and after investigating the availability of suitable work for claimant, he identified the table welding position as being within claimant's restrictions. By letter dated October 10, 2000, employer informed claimant of his failure to report to the clinic per company rules. CX 6. Claimant received this letter on October 16 and reported to work on October 17. HT 47-50. Claimant was discharged on October 17 for

failing to report for work or to provide documentation for his absence. EX 17.

The administrative law judge found that claimant was discharged for breaching company rules, which require that he report to work when medically released to do so or to provide medical documentation for his continued absence. The administrative law judge found that claimant was well versed in applicable procedures, as he had complied with them during the course of his recovery and as he carried a card with such instructions in his wallet. HT at 64. In addition, the administrative law judge based his conclusion upon the testimony of Ms. Gray that she had informed claimant that he must personally contact employer, HT at 88-90, as well as that of Mr. Hartman, employer's Supervisor of Employee Relations, that even if Ms. Gray delivered the documentation from Dr. Klara it would not have relieved claimant from reporting to work. HT at 159.

Substantial evidence supports the administrative law judge's conclusion that claimant was terminated for failure to follow established procedures, and not because of his injury. Moreover, contrary to claimant's contention, the administrative law judge properly found that his discharge was not due to his work injury merely because it was the basis for the absence that led to the discharge. *Brooks*, 26 BRBS at 6; *see also Walker v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Thus, as it is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that claimant is not entitled to total disability benefits. *Brooks*, 26 BRBS at 6.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge