BRB No. 93-0634

DALE A. ALBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAY SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WASAU	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

James L. Evans (Miller, Blazkovec, Evans & Becker), Algoma, Wisconsin, for claimant.

David Topczewski (Schuch and Stilp Law Offices), Appleton, Wisconsin, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-1829) of Administrative Law Judge Charles W. Campbell 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).

The parties stipulated that on November 11, 1986, claimant sustained a work-related lumbosacral strain while working as a welder for employer. Employer voluntarily paid claimant

temporary total disability benefits from November 10, 1986 to November 16, 1986. Claimant returned to work on November 17, 1986, with a temporary 35-pound lifting restriction but injured his back again on August 4, 1987. He apparently lost no time from work immediately following this incident but was taken off heavy work on the ships and provided lighter employment inside the shops similar to bench welding.[1] Thereafter, however, he returned to heavier work on the ships for a short period of time prior to being laid off due to a lack of work on September 9, 1987. That same month, claimant obtained a job with Norfab, a welding shop where he is currently employed, and on January 7, 1988, while still on layoff status, he quit his job with employer. Claimant sought permanent partial disability compensation under the Act for his work-related injuries. 33 U.S.C. §908(c)(21), (h).

The administrative law judge found that since his August 4, 1987, injury claimant has been unable to perform his usual work duties for employer and that, although employer did provide claimant with lighter work for short periods of time, employer made no showing that sustained employment in the lighter work would have been available for the claimant at employer's facility if claimant had not terminated his employment. The administrative law judge further found that claimant's earnings in his post-injury job at Norfab reasonably reflected his post-injury wage-earning capacity and accordingly awarded him permanent partial disability compensation based on the difference between his stipulated average weekly wage of $607.78 and his post-injury weekly earnings of $380 per week starting September 10, 1987.

On appeal, employer challenges the award of permanent partial disability compensation, contending that the administrative law judge's conclusion that claimant was unable to perform his usual work following his August 4, 1987, injury is not supported by the record and is contradicted by the fact that claimant continued to work for employer prior to the economic layoff. Employer further asserts that the administrative law judge erred in finding that claimant sustained a loss in his wage-earning capacity, inasmuch as the lighter duty work claimant performed for employer prior to the layoff, which paid the same as his pre-injury wages, was physically suitable and claimant left this job for economic reasons unrelated to the work injury. Employer avers that claimant's speculative testimony does not provide substantial evidence to support the administrative law judge's finding that similar light duty work would not have been available to claimant following the layoff at employer's facility had he not decided to terminate his employment. Claimant responds, urging affirmance.

After review of the administrative law judge's Decision and Order in light of the record evidence, we affirm his award of permanent partial disability compensation. After noting claimant's uncontradicted testimony that his usual employment required crawling, bending, lifting, and twisting, the administrative law judge rationally found that the weight of the evidence, including the April 21, 1988, restrictions imposed by Dr. Papendick, whom he credited, demonstrated that

[1]This is apparently welding which is performed standing or sitting at a bench without moving around.

claimant has been unable to perform his usual work since the August 4, 1987, work injury. The administrative law judge further found that this conclusion was not negated by the relatively short period of time that claimant performed his usual work immediately prior to the layoff, in view of the shortness of this period, claimant's testimony that he performed this work in pain, and the corroborating medical evidence of record documenting physiological causes for claimant's pain. Inasmuch as the administrative law judge's finding that claimant is unable to perform his usual work is supported by substantial evidence and employer has failed to raise any reversible error made by the administrative law judge, we affirm this determination. *See Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

We also reject employer's assertion that the administrative law judge erred in finding that claimant sustained a loss in his wage-earning capacity because employer provided claimant with suitable light duty work within its facility which paid the same as his pre-injury earnings and similar work would have been available to claimant subsequent to the layoff had he not terminated his employment with employer for economic reasons unrelated to his work injury. Once claimant has established his *prima facie* case of total disability, the burden shifts to employer to establish the availability of suitable alternate employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1991). Moreover, where, as here, employer has provided claimant with a light duty job at its facility but then lays him off for economic reasons, employer has made the alternate work unavailable and claimant is totally disabled absent other evidence of suitable alternate employment, such as that upon which the administrative law judge relied in the present case. *See Mendez v. National Steel and Shipbuilding Co.*, 21 BRBS 22 (1988). The administrative law judge found that although employer placed claimant on light work for short periods of time, there has been no showing that sustained employment in light work would have been available at employer's facility. Contrary to employer's assertions, the administrative law judge rationally found that employer failed to establish that suitable light duty work would have been available to claimant at its facility based on claimant's testimony, Tr. at 60, as corroborated by that of employer's personnel and materials manager, Michael Barry, who confirmed that Bay Ship had no more contracts to build new ships, Tr. at 91. Moreover, Mr. Barry's testimony was equivocal when asked at the hearing regarding whether employer could provide claimant with the type of work he could perform. *Compare* Tr. at 90 and 92. Inasmuch as the administrative law judge's finding that employer failed to establish the availability of suitable

light duty work at its facility is rational and supported by the record, we affirm this determination. *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J., dissenting on other grounds). As employer does not otherwise contest the administrative law judge's findings regarding claimant's post-injury wage-earning capacity, his award of permanent partial disability compensation is affirmed.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.[2]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]Claimant has asked for an attorney's fee for writing his response brief. In order to be awarded an attorney's fee for work performed before the Board, claimant must file a fee petition which conforms with the requirements of 20 C.F.R. §802.203.