

VANESSA GIBSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LANDRY ENTERPRISES,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Denying Temporary Total Disability From September 27, 1991 to February 20, 1992 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Thomas J. Duff (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Temporary Total Disability From September 27, 1991 to February 20, 1992 (91-LHC-392) 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 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 law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 9, 1990, claimant suffered a work-related injury and, as a result, could not return to her former employment. Mr. Davis, a rehabilitation specialist working for employer's carrier, identified an assistant manager trainee position at Goodwill Industries which Dr. Alford approved. Employer's Exhibit C-40, 41. Claimant commenced training as an assistant manager with Goodwill on September 23, 1991, and was fired three days later for alleged theft.

In his Decision and Order, the administrative law judge initially noted the parties' stipulation that claimant cannot return to her pre-injury employment duties with employer and that this claim is limited to employer's liability for temporary total disability compensation for the period September 27, 1991 through February 20, 1992. Transcript at 146-147; Decision and Order at 2, 7. The administrative law judge found that the evidence is overwhelming that merchandise was taken from Goodwill and, thus, that claimant's dismissal appeared reasonable on grounds of misconduct. Thereafter, based upon this specific employment offer as well as the existence of numerous additional employment opportunities identified in a labor market survey, the administrative law judge concluded that employer established the availability of suitable alternate employment paying the minimum wage. Accordingly, as these positions paid greater wages than the \$152 per week claimant received at the time of her injury, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

Where, as in the instant case, claimant is unable to perform her usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). While a showing by employer of a single job opening is insufficient to satisfy its burden of suitable alternate employment, *see Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), employer can satisfy its burden of establishing suitable alternate employment where it has secured a single job offer for claimant, either in its own facility or with another employer, and claimant is capable of performing the offered job. *See Shiver v. United States Marine Corp, Marine Base Exchange*, 23 BRBS 246 (1990). Moreover, employer may establish suitable alternate employment where claimant successfully performs light-duty work, but is discharged for breaching company rules and not for reasons related to his disability. *See Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding and Dry Dock Co.*, 26 BRBS 1 (1992).

Claimant first contends that the Goodwill position constituted vocational rehabilitation and thus was not available employment. We disagree. The unchallenged evidence of record establishes that the Goodwill position provided training for a six month period, after which time a permanent employment position, for at least twelve months, would be available. *See Employer's Exhibit C-37*. Moreover, although employer's carrier paid a prorated amount of claimant's salary during the training period, Goodwill would have to reimburse all monies spent by employer's carrier if claimant was not hired in a full-time capacity. *Id.* We therefore affirm the administrative law judge's implicit

finding that the Goodwill position constituted an available employment opportunity, as it is supported by substantial evidence and in accordance with law. *See Hoard v. Willamette Iron and Steel Co.*, 23 BRBS 38 (1989).

Claimant further contends that the Goodwill position was not suitable since it did not meet her medical requirements. We disagree. In the instant case, the administrative law judge noted that the Goodwill position was approved by Dr. Alford, Employer's Exhibit C-40, 41, who handles job analysis decisions for Dr. Nichols, claimant's treating physician. *See Transcript* at 66. Ms. Eletha Jeter, Director of Human Resources of Goodwill, testified she was aware of claimant's restrictions and that the job was within those restrictions. *Transcript* at 103; Employer's Exhibit C-33. Lastly, claimant testified that she was capable of performing the position and that the stool provided at the cash register would be available if she was working as the assistant store manager. *See Transcript* at 46. Inasmuch as the administrative law judge's findings are rational and supported by substantial evidence, we affirm the administrative law judge's determination that the Goodwill position offered to claimant was suitable and within her restrictions. *See generally Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT). Accordingly, as the administrative law judge's finding that claimant's inability to perform the post-injury job at Goodwill was due to her own misfeasance in violating a company rule is uncontroverted on appeal, we affirm the administrative law judge's finding that this position constituted suitable alternate employment, *see Shiver*, 23 BRBS 246 (1990), and his consequent denial of temporary total disability benefits to claimant. *See Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT).

Accordingly, the Decision and Order - Denying Temporary Total Disability From September 27, 1991 to February 20, 1992 of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge