BRB Nos. 00-416
and 00-416A

MIKLE JOHNSON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NABORS OFFSHORE DRILLING INCORPORATED	)	DATE ISSUED: Jan 9, 2001
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Warren A. Perrin, Lafayette, Louisiana, for claimant.

Wilton E. Bland III (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Order Denying Motion for Reconsideration (1999-LHC-353) of Administrative Law Judge Lee J. Romero, 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a motor man on an offshore oil rig. On May 31,

[1]Due to the locale of the work station, employees work on a "seven days on, seven days off" schedule. This schedule carries over to the light duty program also. Tr. at 21.

1998, while carrying a port-a-potty jack weighing approximately 60 pounds, claimant slipped and fell down 13 steps in a flight of stairs. He injured his arm, back, shoulder and lower head. Tr. at 8, 67-68. He was able to get ashore by the next morning and was taken to see Dr. Cenac, the doctor recommended by employer. After an examination, Dr. Cenac diagnosed a cervical strain, prescribed medication and then released claimant to return to light duty work on the rig. Claimant returned to employer's facility but then decided he was unable to work and would go home. Emp. Ex. 1; Tr. at 68-69. Through the course of the week, claimant attended physical therapy and then met again with Dr. Cenac on June 8, 1998. This time, Dr. Cenac recommended light duty work in an office. Emp. Ex. 1. During his third appointment with Dr. Cenac, on June 15, 1998, at which time Dr. Cenac recommended continued physical therapy and again released claimant to return to light duty work in an office, Ms. Duplantis, employer's claims manager, along with Dr. Cenac, explained employer's Transitional Education Program (TEP) to claimant. Emp. Ex. 1; Tr. at 11, 73.

After the appointment, claimant returned to the facility living quarters to begin the program. He testified that his wallet, keys and medications were taken from him and locked in a safe and that he was given a locker, room and bed assignment, and was told to read and sign the last page of a multi-page document. After doing so, and after stowing his belongings, he and the other employees in the program were ushered into the recreation room whereupon someone pointed to a number of them and told them to get buckets, rags and brushes to wash down the walls of the living quarters. Claimant testified he refused due to his injury but was ignored. At this point, he testified he collected his belongings, asked for those stored in the safe, and told Ms. Duplantis he was leaving. Tr. at 74-79. According to the testimony of both claimant and Ms. Duplantis, she warned him that leaving the TEP was grounds for immediate termination. Tr. at 29, 79. Ms. Duplantis testified that claimant's reasons for leaving were vague, but she thought he was unhappy with the program as well as with Dr. Cenac. Tr. at 29. Claimant testified he was dissatisfied with Dr. Cenac and wanted to see his own doctor. Tr. at 79. In any event, claimant was terminated for leaving his work site. Emp. Ex. 4.

On July 21, 1998, claimant saw Dr. deAlvare, a neurologist, who diagnosed a severe myofascial syndrome and temporomandibular joint pain syndrome. He withheld claimant from all work and prescribed medications and physical therapy. Cl. Ex. 1. In September 1998, he referred claimant to Dr. Duval, an orthopedic surgeon. Dr. Duval diagnosed posterior subluxation of claimant's right shoulder, prescribed physical therapy, and released him to sedentary work. Emp. Ex. 3. In February 1999, Dr. Duval noted that the subluxations continued and he recommended full posterior reconstructive surgery of the right shoulder.

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[2]According to claimant, he saw a doctor at a clinic in his hometown shortly after he left employer's program. Other treatment was difficult to obtain according to claimant and his wife, as they were in financial difficulties. Claimant's counsel referred him to Dr. deAlvare. Tr. at 82, 84-85, 110.

He ordered restricted use of claimant's right arm. *Id.* Both doctors continue to treat claimant, and Dr. deAlvare has not released him to return to any work.

Claimant filed a claim for disability compensation and also alleged that employer violated Section 49 of the Act, 33 U.S.C. §948a, by discriminatorily terminating claimant. The administrative law judge found that claimant cannot return to his usual work pursuant to the opinions of all three doctors. Decision and Order at 14. Further, he found that, according to Drs. deAlvare and Duval, claimant cannot participate in employer's TEP, and pursuant to Dr. deAlvare, whose opinion the administrative law judge gave the most weight, claimant cannot return to any work due to his injury. Decision and Order at 14-15. In addition to the doctors' opinions, the administrative law judge stated that employer did not establish the duties of the TEP with specificity and that employer did not take claimant's restrictions into account when assigning him work. Therefore, the administrative law judge found that the TEP did not constitute suitable alternate employment for claimant. *Id.* at 15. As claimant's condition has not reached maximum medical improvement, the administrative law judge awarded claimant temporary total disability benefits based on the stipulated average weekly wage of $673. *Id.* at 16; Tr. at 8. The administrative law judge then addressed claimant's assertion of discriminatory discharge. He found that claimant's termination was a personnel action which occurred before claimant filed a claim for benefits and that the action therefore did not invoke Section 49. *Id.* at 17-18. Additionally, the administrative law judge awarded claimant past and future medical benefits including recommended surgery, a Section 14(e), 33 U.S.C. §914(e), penalty, and interest. *Id.* at 19-20.

Employer filed a motion for reconsideration, arguing that the TEP constituted suitable alternate employment and that claimant's average weekly wage at the time of his injury, pursuant to his earnings history, was less than $673. The administrative law judge addressed employer's arguments but denied reconsideration. He stated that employer stipulated to claimant's average weekly wage and that the evidence which employer attempted to submit post-hearing was available prior to the hearing, so it would not be admitted. Decision and Order Denying Recon. at 3-4. With regard to suitable alternate employment, the administrative law judge reiterated that he gave Dr. deAlvare's opinion the greatest weight and that Dr. deAlvare has not released claimant to return to any work. *Id.* at 4. Moreover, the administrative law judge stated that the TEP does not constitute suitable alternate employment because Dr. Cenac restricted claimant to sedentary work in an office and Dr. Duval restricted the use of claimant's right arm; the administrative law judge found that the wall-washing work assigned to claimant when he entered the TEP did not meet either criterion. *Id.* at 5. The administrative law judge further noted that neither doctor listed claimant's specific restrictions and employer did not identify the specific duties of the light duty job; therefore, he reaffirmed his conclusion that the TEP is not suitable alternate employment for claimant. *Id.* at 5-6.

Employer appeals the administrative law judge's decisions concerning suitable alternate employment and average weekly wage, and claimant responds, urging affirmance.

BRB No. 00-416. Claimant cross-appeals the administrative law judge's finding that Section 49 is inapplicable, and employer responds, urging affirmance. BRB No. 00-416A.

Initially, we reject employer's assertion that the administrative law judge erred in declining to consider the average weekly wage issue. Attached to its motion for reconsideration were documents of claimant's wage history which employer asserted establish claimant's average weekly wage at $473.85 instead of $673. In its appeal, employer claims it received these documents after the hearing because of claimant's delayed answers to interrogatories, which prevented timely receipt of claimant's wage information from government authorities. Although this may indeed be the case, employer, as the administrative law judge stated, stipulated to the average weekly wage of $673 and did not indicate that its information was incomplete or that additional information was forthcoming. Tr. at 8. The stipulation is binding, and the issue cannot be raised on appeal. *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Therefore, we affirm the administrative law judge's denial of reconsideration on this issue.

Employer also challenges the administrative law judge's determination that the TEP is not suitable alternate employment. It argues that the program is designed to assist employees in returning to the work force and that no employee is required to work beyond his abilities. Thus, employer states it was claimant's responsibility to inform the TEP supervisor of any difficulties and the supervisor would reassign him to more appropriate work. In this case, employer argues, claimant elected to walk away from suitable alternate employment and he has not attempted to return. Therefore, employer asserts its burden was met, and claimant is not entitled to benefits.

Once a claimant establishes that he cannot return to his usual work, as here, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer establishes the availability of suitable alternate employment, the claimant is, at most, partially disabled, commencing on the date the showing of suitable alternate employment is made. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.).

Ms. Duplantis testified at length about the general aspects of the TEP. She described it as a light duty program which enables injured employees to be rehabilitated, to remain productive, and to maintain their full wages. Tr. at 11, 19-22. Those employees who are

[3]No party disputes that claimant cannot return to his usual work or that his condition has not yet reached maximum medical improvement.

injured on the job, who cannot return to their regular work, and who have been released to light duty work are eligible for the program. Injured workers could be assigned paperwork, such as putting together manuals, classroom activities to enhance employment skills, or physical work such as clean up, yard work, and gardening for those who are able. Afternoons in the program are reserved for medical and physical therapy appointments, and transportation is provided by employer. Because the employees live at the facility and their schedule is as if they were working on a rig, meals are included and recreational activities are available. Tr. at 15, 19-21. Ms. Duplantis testified that accommodations are made to ensure employees are assigned to work within their restrictions, and she stated that if an employee felt his work was too difficult for him, he could report to the supervisor and receive another assignment. Tr. at 17-18. She further stated there is no time limit for remaining in the TEP; however, once an employee's condition reaches maximum medical improvement, he would either return to his usual work, be reassigned more appropriate work given his condition, or, if alternate work was unavailable, be retrained for other work. Tr. at 22. In discussing claimant's particular situation, Ms. Duplantis stated that, on June 15, 1998, claimant came to her office and said he was leaving the TEP. According to her, he was vague and stated he did not like either the doctor or the program but he did not say anything about being physically unable to perform the duties or wanting to see a different doctor. Tr. at 29, 35, 59. Although she testified she attempted to convince claimant to stay in the program, he left. Tr. at 29.

The administrative law judge found that the TEP did not constitute suitable alternate employment, noting first that Dr. deAlvare had not released claimant to return to any work. *See* Cl. Ex. 1. Based on his review of the evidence, the administrative law judge gave Dr. deAlvare's opinion the most weight, and accordingly concluded claimant was unable to return to any work, specifically, including the TEP Program. As the administrative law judge may accept or reject evidence as he deems proper and may assess the credibility of the witnesses, *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and as the Board may not reweigh the evidence, but only may assess whether there is substantial evidence to support the administrative law judge's decision, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981), we affirm the administrative law judge's conclusion that claimant has not been released to return to any work. Consequently, claimant is entitled to total disability benefits. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

We also affirm the administrative law judge's award of temporary total disability

[4]According to Ms. Duplantis, Drs. Cenac and Duval are familiar with employer's program. Tr. at 17.

benefits because his alternate reason for rejecting employer's argument, *i.e.*, that the assigned work was not within the light duty recommendations of Drs. Cenac and Duval, is rational. The administrative law judge found that neither doctor gave specific restrictions to claimant and that employer's program does not have specific duties to compare with any restrictions claimant might have. Decision and Order at 15; *see Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). As stated previously, Dr. Cenac released claimant to light duty work in an office and Dr. Duval released him to sedentary work with restricted used of the right arm. Emp. Exs. 1, 3. Neither physician listed any other specific restrictions. In comparing these release instructions to the job of washing walls in the employee's living quarters which claimant contends he was assigned, the administrative law judge reasonably concluded that the assigned job was not suitable. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Although testimony reflects there may have been other tasks available for claimant to perform, the program was discussed in generalizations and not in details specific to claimant. *See* Tr. at 11-23. Therefore, we affirm the administrative law judge's alternate finding that employer has failed to establish the availability of suitable alternate employment on these grounds as well as the consequent award of temporary total disability benefits. *See Turner*, 661 F.2d at 1031, 14 BRBS at 156.

Claimant cross-appeals the administrative law judge's decision, arguing he erred in finding that employer did not violate Section 49 by terminating him. The administrative law judge specifically found that claimant's termination occurred before claimant filed a claim under the Act or before he undertook any other action which is protected by Section 49. Decision and Order at 17-18. He also found that employer's treatment of claimant was contradictory in that claimant was permitted to go home without ramifications the day after the incident, but he was not permitted to do so once he was admitted to the TEP. *Id.* at 18. Nevertheless, because of the timing of the termination, the administrative law judge concluded that employer's action against claimant was not in violation of Section 49. Claimant contends this narrow interpretation that a formal claim is necessary to invoke Section 49 is improper and would permit employers to discharge employees, without penalty, immediately after they have been injured. In response, employer asserts that the timing of the termination proves that it was not in violation of Section 49, that the termination was in accordance with its company policy, that claimant was not prevented from seeing his own doctor and that he was aware of the ramifications when he left the program on June 15, 1998. Thus, employer avers the administrative law judge properly declined to invoke Section 49 in this situation.

Section 49 prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act, and if the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a. Section 49 states in pertinent part:

It shall be unlawful for any employer or his duly authorized agent to discharge

> or in any other manner discriminate against an employee as to his employment *because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.* The discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Any employer who violates this section shall be liable to a penalty of not less than $1,000 or more than $5,000, as may be determined by the deputy commissioner.

33 U.S.C. §948a (emphasis added). To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988), *aff'g Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987); *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). The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks*, 26 BRBS at 3. The essence of discrimination is in treating the claimant differently from other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

The present case is similar to *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). In *Ledet*, the United States Court of Appeals for the Fifth Circuit affirmed an administrative law judge's determination that an employer did not act with discriminatory intent when it terminated the claimant in February 1990, retroactive to November 30, 1989. In that case, the claimant was injured in August 1989, continued to work until October 1989, and then filed a claim for benefits in April 1990. The court concluded that the administrative law judge's determination that the claimant's termination was due to his failure to provide medical documentation of his injury despite repeated requests by the employer was supported by the evidence. Thus, the administrative law judge's rejection of claimant's discrimination claim was affirmed, as there was no evidence of a discriminatory motive. *Ledet*, 163 F.3d at 904, 32 BRBS at 213-214(CRT).

In the instant case, claimant has similarly failed to present evidence of discrimination. Claimant left the TEP on June 15, 1998. On June 18, his termination, retroactive to June 15, was approved. Six days later, on June 24, employer received notice from claimant's counsel regarding his request for medical benefits. In September 1998, claimant filed his formal claim for benefits. *See* Decision and Order at 17; Emp. Ex. 4. Employer contends claimant's termination was in accordance with its policy, which provides that any employee who does not show up for work is terminated, and it points to Ms. Duplantis's testimony that claimant, in fact, was advised he would be subject to termination in accordance with this policy if he left the TEP on June 15. Tr. at 33. Although the administrative law judge noted the discrepancy in employer's enforcement of its policy based on its disparate treatment of claimant on June 1 when he left work and no action was taken, and June 15, inasmuch as the

termination occurred before claimant filed a claim, the administrative law judge found there was no violation of Section 49. While we decline to hold that the termination of an employee prior to his filing of a formal claim is, *ipso facto*, a non-discriminatory discharge, we affirm the administrative law judge's conclusion that claimant's termination was not in violation of Section 49, as the record contains no evidence that claimant was treated differently from similar employees. Claimant bears the burden of establishing a discriminatory act motivated by animus, which requires that he show that he was treated differently, individually or as part of a class, from "like groups or individuals." *Holliman*, 852 F.2d at 761, 21 BRBS at 128-129(CRT); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). Claimant has not fulfilled this burden, as he presented no evidence that he was treated differently from other employees violating company policy; claimant has shown only that he was treated differently on two different occasions when he left work. Thus, the record lacks evidence sufficient to meet claimant's initial burden under Section 49. In contrast, the record does contain evidence that employer terminated claimant's employment because of his violation of an employment policy; thus, the only evidence supports a finding of no discrimination. *See Ledet*, 163 F.3d at 904, 32 BRBS at 213-214(CRT); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Hunt*, 28 BRBS at 369. As claimant has not met his burden of proof, we affirm the administrative law judge's conclusion that Section 49 has not been violated.

Accordingly, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[5]Ms. Duplantis testified that she did not know the particular reason claimant was permitted to go home on June 1, but that the difference between June 1 and June 15 may have been due to any number of reasons including a lack of light duty work or an inability to transport claimant back to the rig. Tr. at 49. In any event, employer cannot be said to have discriminated against claimant simply because it did not fire him at the first opportunity.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge