BRB No. 11-0376

VICTORINO VENTURA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARISCO, LIMITED	)	DATE ISSUED: 01/27/2012
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Carrier	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Reinstatement and Backpay and Order Denying Employer's Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum (Law Offices of Steven M. Birnbaum, P.C.), San Rafael, California, and Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Michael W. Thomas and Shana L. Prechtl (Thomas, Quinn & Krieger, L.L.P.), San Francisco, California, for employer.

Matthew H. Ammerman (Law Office of Matthew H. Ammerman, P.C.), Houston, Texas, for carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Reinstatement and Backpay and Order Denying Employer's Motion for Reconsideration (2009-LHC-1313) of Administrative Law Judge Russell D. Pulver 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 suffered a work-related shoulder injury on June 19, 2008. He attempted to return to work the next day, but had to seek medical treatment. Despite his treating physician's restriction against returning to work until October 27, 2008, claimant returned on October 13, 2008, at his supervisor's request that he work on a "special project." This work was not clocked in and was paid for with checks made out to "cash."[1] Claimant's "special project" ended on October 31, 2008, but claimant continued to work for employer. On October 27, 2008, claimant was medically released to light-duty work. Claimant contends that, other than on October 13 and 14, 2008, he was not given light or modified duties. Claimant testified that he was given "other additional jobs" but that they were "not really a modified kind" and caused him pain. Tr. at 103. Employer provided claimant an assistant, Paepaega Matautia, also known as "Popeye," to do all the heavy lifting and machine set up. However, claimant contends that Popeye was able to help him only some of the time as he had his own work to complete. *Id*. at 96. Claimant testified that he informed employer that operating the machines was causing him pain. He also stated that, in early November, he informed employer he could no longer work due to the pain and was awaiting shoulder surgery.

Claimant's work attendance in November 2008 was sporadic, and he does not contest his failure to call the sick line to inform employer in advance of any of his absences. Claimant received a termination letter dated November 20, 2008, stating that his termination was based on his failure to comply with employer's sick-line policy.[2] Claimant filed a claim under the Act on November 5, 2008, for compensation benefits, which was not served on employer until November 24, 2008, four days after claimant was terminated. EX 6. Claimant's May 14, 2009, Pre-Hearing Statement, in addition to

[1]Claimant was receiving temporary total disability benefits during this time as well.

[2]Claimant missed work and did not call the sick line before his absences on November 5, 6, 7, 10, 11, 12, 13, 17, 18, and 19. He disputed that these company policies applied to him after the special project ended, alleging that employer never informed him that its policies again applied to him. Claimant disputed that he received an oral warning on November 5, 2008, or that he was read and refused to sign a written warning on November 13, 2008, for failing to properly punch in and out on the clock and call the sick line in advance of his absences. However, there is no question that he received a second warning on November 20, 2008, the day that he was terminated for failing to call the sick line in advance of his absences on November 17-19. EXs 10, 11.

raising a claim for unpaid temporary total disability benefits, raised a Section 49, 33 U.S.C. §948a, discrimination issue. The administrative law judge addressed only the Section 49 issue in his Decision and Order.[3]

The administrative law judge found that employer used claimant's violation of the call-in policy as a pretext to terminate claimant and that employer, therefore, violated Section 49 by terminating claimant because of his claim under the Act. Accordingly, the administrative law judge awarded claimant reinstatement and back pay. However, because he did not have sufficient information to calculate a back pay award, the administrative law judge remanded the case for the district director to make the calculation. The administrative law judge also penalized employer $5,000 for its discriminatory act. The administrative law judge denied employer's motion for reconsideration. Employer appeals the administrative law judge's Decision and Order and Order Denying Reconsideration.

Employer contends the administrative law judge erred in finding it violated Section 49 of the Act. Employer argues that it terminated claimant for violating a work rule and that the award of reinstatement and back pay not only exceeds what claimant sought in his claim, but is in violation of the plain language of the Act, as claimant is not qualified to return to work.[4] Lastly, employer asserts that the administrative law judge erred in delegating the calculation of back pay to the district director, as he provided no facts or method of calculating such.[5] Claimant has not responded to employer's appeal.[6]

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[3]Employer's carrier agreed to pay medical benefits and to reinstate compensation payments; thus, the administrative law judge did not address the disability claim. *See* n.6, *infra.*

[4]At the time of the hearing, claimant was receiving temporary total disability benefits and conceded he was seeking only medical benefits. In response to the motion for reconsideration, claimant asserted he is entitled to back pay despite receiving temporary total disability benefits.

[5]Claimant moved to dismiss employer's appeal and remand the case on the ground that the appeal is interlocutory; however, he agreed with employer that the administrative law judge erred in abdicating his duty to calculate a back pay award. The Board denied claimant's motions to dismiss and remand in an Order dated August 17, 2011.

[6]However, claimant and carrier filed a joint motion to sever the Section 49 claim from the disability claim and remand the disability claim to allow the administrative law judge to address their settlement agreement. *See* n.3, *supra.* Alternatively, claimant and carrier request clarification from the Board that it does not have jurisdiction over the

Employer first contends the administrative law judge erred in finding that claimant's termination was discriminatory and in violation of the Act. Section 49 of the Act, 33 U.S.C. §948a, provides that an employer may not discriminate against an employee who has either claimed or attempted to claim compensation under the Act from the employer.[7] If it is demonstrated that the employer did in fact discriminate against the employee on this basis, the employer shall be liable for a penalty payable to the Special Fund and must reinstate the claimant to his employment. To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated at least in part by a discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding & Dry Dock Co*., 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988); *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). Discharges violate Section 49 of the Act even if they are only partly motivated by the fact that an employee has claimed or received compensation. *See Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1979). The circumstances of an employee's discharge may be examined to determine whether the employer's reason for discharge is the actual motive or a mere pretext, and the administrative law judge may infer animus from the circumstances. *See, e.g., Brooks*, 26 BRBS at 3. The essence of discrimination is in treating the claimant differently than other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). When an administrative law judge adjudicates a claim of discriminatory discharge under Section 49 of the Act, the issue before him is whether the actual motive for the discharge was animus against the employee who filed a compensation claim. *Winburn*, 9 BRBS 363. Once these threshold elements are established, the employer may defeat the claim by demonstrating that its action was not

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disability claim so that the administrative law judge may consider the Section 8(i), 33 U.S.C. §908(i), settlement application. Nothing in the Act or regulations prevents the administrative law judge from considering the parties' settlement agreement, and the Board's decision on the Section 49 claim does not affect the administrative law judge's jurisdiction to rule on the Section 8(i) settlement application. Nonetheless, we shall remand this case so that the administrative law judge may act on the settlement agreement.

[7]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 . . . .

33 U.S.C. §948a.

motivated, even in part, by the claimant's exercise of his rights under the Act. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

In this case, the administrative law judge examined the circumstances of claimant's discharge and determined that employer's stated reason for terminating claimant, repeatedly failing to abide by the company's call-in policy, was pretextual.[8] The administrative law judge found that employer did not consistently apply its call-in policy, based on its exempting claimant from those policies at least at certain times.[9] Decision and Order at 8. The administrative law judge further found animus in the timing of claimant's termination because it occurred as he was pursuing his claim, and it

[8]Employer's Employment Policy states:

> If you are unable to work or expect to be late for any reason (including illness or injury), you must call the company's sick line at 564-0750 by 7:30 a.m. or no later than two (2) hours before your schedule starting time, when applicable. At that time you must state the reason(s) for your absence and your anticipated date of return to work. If an employee does not show up for work when scheduled and fails to notify [employer] in accordance with this notification procedure for three (3) consecutive days, the employee will be deemed to have voluntarily resigned.
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> [A]n unreported or unexcused absence of three (3) consecutive workdays shall be considered a voluntary termination, and result in a separation of employment with [employer].

EX 1 at 9, 28.

[9]The administrative law judge found that it was undisputed that employer made a special arrangement with claimant in which claimant was exempt from abiding by the company policies for some period, and "employer failed to produce proof showing that [C]laimant was informed that the arrangement ended and he was instructed to resume abiding by the company policies." Decision and Order at 8.

closely followed his medical deterioration and inability to continue working.[10] The administrative law judge inferred that "an injured machinist employee [such as claimant] was of very little use to the company," and "would be considered a drain on the company resources," especially because of the demonstrated lack of light-duty work available in the machine shop.[11] He also found it "unbelievable" that employer expected claimant to call the sick line every day to reiterate that he was scheduled for surgery and not coming to work. Decision and Order at 8. Rejecting employer's evidence of termination letters to seven other employees who violated the call-in policy and stating that those letters did not rebut a finding of animus in this case, the administrative law judge determined that employer's termination of claimant was discriminatory under Section 49. Decision and Order at 8-9.

We reject employer's argument that the administrative law judge erred in finding discriminatory animus in this case. Although an administrative law judge's judgment of the validity an employer's absenteeism policy is not a valid basis for finding animus, *see Holliman,* 852 F.2d 759, 21 BRBS 124(CRT); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988); *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978) (violation of an "onerous" daily call-in policy is not a pretext for terminating an injured employee absent other evidence), and the administrative law judge found that application of the policy was "unbelievable" in this case, substantial evidence nevertheless supports his overall decision. Specifically, the administrative law judge found that employer inconsistently applied and enforced its rules as is evidenced by the exceptions employer made under its special arrangement with claimant. Moreover, the administrative law judge found that employer failed to show that claimant was instructed to resume abiding by the company policies after the special arrangement ended.[12] Additionally, the absence

[10]Although claimant did not remember the exact date he told employer he could no longer work and was awaiting shoulder surgery, the administrative law judge credited his testimony that it was in early November, which would have been prior to his filing a claim and prior to his termination. Decision and Order at 5-6; Tr. at 111-113, 245.

[11]In so finding, the administrative law judge rationally credited the testimony of Mr. Javier, claimant's former supervisor, that there was no light-duty work in the machine shop, and claimant's testimony that he was not given any modified or light-duty work after his medical release. This testimony also was consistent with what claimant had reported to his physician and case manager. Decision and Order at 4; Tr. 42, 101-103; *see Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

[12]In so finding, the administrative law judge credited claimant's testimony that the only warning he received was the second written warning, which he received on the day

of available light-duty work in the machine shop supports the administrative law judge's inference that employer had little use for an injured machinist who would drain company resources.[13] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Machado*, 9 BRBS 803. Finally, the administrative law judge acted within his discretion in crediting claimant's testimony about informing employer in "early November" that he would be off work awaiting shoulder surgery.[14] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, despite employer's assertion that a violation of its work policy was the reason for claimant's termination, there is substantial evidence to support the administrative law judge's inference that claimant's termination was, at least in part, the result of his inability to work and his filing of a claim. *Machado*, 9 BRBS 803. Accordingly, as it is rational and supported by substantial evidence, we affirm the findings that claimant's violation of the work policy was a pretextual reason for claimant's discharge and that employer's termination of claimant was an act instigated by discriminatory animus in violation of Section 49 of the Act.[15] *See Monta*, 39 BRBS 104; *Winburn*, 9 BRBS 363.

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he was terminated. The administrative law judge found Ms. Kaopuiki's testimony regarding the alleged first written warning not credible because it was refuted by testimony from claimant and Popeye and because he found that Ms. Kaopuiki's "position as both the sole Human Resources employee and the President's secretary may have compromised her ability to be forthright in her dealings with claimant." Decision and Order at 5, 8.

[13]Contrary to employer's assertion that it made accommodations for claimant, the fact that claimant needed an assistant to work in the machine shop supports the administrative law judge's finding that light-duty work was unavailable.

[14]Thus, although employer terminated claimant four days prior to receiving formal notice of claimant's claim for benefits under the Act, employer was aware of claimant's injury at work and had paid him some temporary total disability benefits before terminating him. Tr. at 256.

[15]We reject employer's assertion that the administrative law judge erred in failing to place the burden of proof on claimant to establish he was treated differently from other employees who violated company policy. *See Dill v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 738, 742 (1977) (holding that questions relating to presumptions or the burden of making a *prima facie* case are answered by the conclusion that there is substantial evidence to support the finding of discriminatory discharge). Moreover, the administrative law judge permissibly found that claimant showed that after he advised employer he would not be returning to work until after shoulder surgery he was treated differently than he had been earlier, *i.e.*, employer did not apply its personnel rules consistently.

Therefore, we affirm the imposition on employer alone of a penalty of $5,000. 33 U.S.C. §948a.

Employer also contends the administrative law judge erred in awarding claimant reinstatement and back pay. It asserts that such an award violates the plain language of the Act because claimant is not qualified to return to work.

Section 49 of the Act provides, in pertinent part, that:

> Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: *Provided*, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

33 U.S.C. §948a. Section 702.271(d) of the regulations states that "[a]ny employee discriminated against is entitled to be restored to his employment and to be compensated by the employer for any loss of wages arising out of such discrimination provided that the employee is qualified to perform the duties of the employment." 20 C.F.R. §702.271(d); *see also* 20 C.F.R. §702.271(a)(2). Thus, the remedy for a claimant who has been discriminated against is the reinstatement of his job and the payment of back wages, provided he is qualified to perform the job. *See G.M. [Meeker] v. P. & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009).

In *Monta*, 39 BRBS 104, the administrative law judge ordered the claimant to be reinstated to the job from which the employer had fired her in violation of Section 49, even though she was temporarily totally disabled. The administrative law judge postponed the determination of the claimant's capability to actually perform the job duties until after her condition reached maximum medical improvement. The Board affirmed this decision, deferring to the position of the Director, Office of Workers' Compensation Programs, that this interpretation is reasonable and consistent with the purposes of the Act.[16] *Monta*, 39 BRBS at 111. Therefore, the Board held it was reasonable to assess a claimant's ability to perform her job duties and, hence, her entitlement to permanent reinstatement, after her condition reached maximum medical improvement. *Id*.

[16]In *Monta*, the administrative law judge ordered the claimant to be reinstated to her employment even though she had not yet reached maximum medical improvement because immediate reinstatement had a tangible significance in that it enabled her to shop at the Navy Exchange, a benefit not available to former employees. *Monta*, 39 BRBS at 111.

In this case, the administrative law judge cited *Monta* and determined that claimant is entitled to reinstatement and back pay "because employer discriminated against [him,]" but that he is not entitled to back pay during the time he receives temporary total disability benefits. Decision and Order at 9. As the administrative law judge also found that "it remains unclear whether [claimant] will be physically able to resume work as a machinist in the future" because he has not yet reached maximum medical improvement, *id.* at 6, we read the administrative law judge's decision as postponing the assessment of claimant's capabilities until he reaches maximum medical improvement and reinstating claimant's employment until that assessment can be made. *See Monta*, 39 BRBS at 111. As it is consistent with *Monta*, we affirm the administrative law judge's decision to reinstate claimant until such time as his condition reaches maximum medical improvement and his capacity to perform his job duties may be assessed. *Id.*; 20 C.F.R. §702.271(d).

With regard to claimant's entitlement to back pay, the administrative law judge correctly found that claimant cannot receive both back pay and temporary total disability benefits at the same time. Decision and Order at 9. It is not clear from the record created below whether there are gaps in claimant's receipt of temporary total disability benefits. Nonetheless, the administrative law judge stated that because the parties did not introduce into the record any evidence concerning claimant's wages, he could not calculate a back pay award. Therefore, he remanded the case for the district director to compute the back pay award. On employer's motion for reconsideration the administrative law judge again emphasized the lack of evidence concerning claimant's wages. He also stated that if the parties disagree after the district director calculates the back pay award, then either party can request a hearing on the matter. Order on Recon. at 1.

We reject the contention that the administrative law judge erred as a matter of law in remanding the case to the district director for the calculation of the back pay award. The regulation at 20 C.F.R. §702.272 informs this result. Section 702.272 states that the district director may recommend the amount of compensation for wage loss due an employee who has been discriminated against. 20 C.F.R. §702.272(a). If the parties disagree with the district director's calculation, then the case will be referred to an administrative law judge for a hearing. 20 C.F.R. §702.272(b); *see also* 20 C.F.R. §§702.315-317. Moreover, it appears that the reason for the evidentiary gap is that claimant did not specifically claim back pay until he responded to employer's motion for reconsideration, which, in turn was filed in response to the administrative law judge's finding that claimant is entitled to an award of back pay. When a new issue arises during the course of the proceedings, the administrative law judge may remand the case to the district director for consideration of that issue. 20 C.F.R. §702.336(a). While an administrative law judge clearly has the authority to make findings of fact in the first instance, *see* 33 U.S.C. §919(d); 20 C.F.R. §702.273, the parties' supposition that an

administrative law judge must do so in the absence of disagreement is not supported by the regulatory framework.

Nonetheless, because the parties assert that the district director has not calculated the back pay award, and because the administrative law judge has not acted on the parties' Section 8(i) settlement agreement, we remand this case to the administrative law judge for findings on the back pay issue. The administrative law judge should solicit from the parties and admit into evidence the information necessary for his calculation of a back pay award only for periods when claimant was not entitled to receive temporary total disability benefits.[17] The administrative law judge also should act on the parties' settlement agreement, consistent with Section 8(i) and 20 C.F.R. §§702.241-273. If, by virtue of an approved settlement or otherwise it is found that claimant has reached maximum medical improvement and is unable to resume his former work, the administrative law judge must terminate the order of back pay and reinstatement. *Meeker,* 43 BRBS 68.

Accordingly, the administrative law judge's findings that employer discriminated against claimant in violation of Section 49 and that employer is liable for a penalty are affirmed. The case is remanded for further proceedings consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[17]The administrative law judge also should address employer's contention that it is entitled to credit claimant's post-injury actual wages against any award of back pay.