BRB No. 88-1935

SAMMY H. LUCIANA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Dana Adler Rosen (Rutter & Montagna), Norfolk, Virginia, for claimant.

Forest A. Nester (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order (87-LHC-1427) of Administrative Law Judge Charles P. Rippey awarding benefits 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).[1] 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).

[1] Pursuant to employer's motion, its cross-appeal, BRB No. 88-1935A, was dismissed by Board Order issued September 26, 1988.

Claimant injured his right wrist in the course of his employment as a pipefitter on July 20, 1981. He returned to work at his usual employment, but he was limited to light duty pursuant to the work restrictions of his treating physician, Dr. Gwathmey. Employer voluntarily paid compensation under the Act for temporary total disability, 33 U.S.C. §908 (b), for various periods between August 25, 1981, and June 12, 1987, and it provided medical benefits. After each period of disability, claimant returned to light duty at his usual employment. Claimant experienced continuing problems with his wrist, and he required bone fusion surgery in 1983 and 1984. Claimant alleged that he reinjured his right wrist lifting a pipe at work on July 25, 1986. Dr. Gwathmey opined that claimant aggravated the fusion site and that he would probably need to refuse the wrist in the future. Ex. 9 at 24.

On August 22, 1986, claimant filed a claim for benefits under the Act for the second work-related wrist injury. Claimant subsequently was transferred by employer to the Material Control Department, which the record indicates occurred on April 6, 1987. Ex. 7 at 3. On May 14, 1987, claimant received a Foreman's Warning for repeated absences pursuant to employer's Regulation 22. At the formal hearing, claimant sought additional compensation for 120 days that he was absent from work at various times between October 1, 1984, and October 21, 1987, which he alleged was due to his work-related wrist injuries. He also sought compensation for temporary partial disability, 33 U.S.C. §908(e), from August 1, 1986, and continuing, due to an alleged loss of overtime pay caused by the second alleged work injury. Finally, claimant contended that employer's issuance of the Foreman's Warning violated Section 49 of the Act, 33 U.S.C. §948a, which prohibits discrimination against an employee for claiming or attempting to claim compensation from employer.

The administrative law judge awarded claimant temporary total disability benefits for 7 of the 120 days claimed, denied the claim for temporary partial disability benefits, and found that employer's issuance of a Foreman's Warning did not violate Section 49. On appeal, claimant challenges the administrative law judge's denial of compensation for the days in which he alleged he was temporarily totally disabled; his denial of compensation for temporary partial disability benefits based on a loss of overtime pay; and, his finding that the issuance of the Foreman's Warning did not violate Section 49. Employer responds, urging affirmance.

Claimant argues that his uncontroverted testimony establishes his entitlement to compensation for the days he alleged that he missed work due to his wrist injuries. In the instant case, with one exception, the administrative law judge awarded claimant benefits for temporary total disability only when an injury-related absence was established by a disability slip from Dr. Gwathmey. The administrative law judge credited claimant's testimony that he could obtain a disability slip from Dr. Gwathmey as needed. He therefore found that claimant was not disabled due to his work injuries when he failed to produce a disability slip. In all other respects, the administrative law judge discredited claimant's testimony because of its rehearsed and automatic presentation and because claimant had alleged entitlement to compensation on days employer had already paid compensation. Although not supported by a disability slip and employer's attendance records for the specific day in question, the administrative law judge also awarded benefits when claimant was absent on October 3, 1986. The administrative law judge reasoned that employer

voluntarily paid compensation on September 25 and 26 and on October 21, 24 and 27, 1986, without specific medical confirmation. The administrative law judge therefore determined that there was substantial evidence that claimant's absence from work on October 3, 1986, was injury-related.

It is claimant's burden to establish the nature and extent of disability. *Anderson v. Todd Shipyards Corp.,* 22 BRBS 20, 21 (1989). We hold that the administrative law judge acted within his discretion as fact-finder in awarding benefits for temporary total disability only for days when claimant had specific evidence of disability. *See Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1324-1327 (D.R.I. 1969). Since his findings regarding claimant's allegations of injury-related disability are supported by substantial evidence, they are affirmed. *See Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 944-945, 25 BRBS 78, 80-81 (CRT)(5th Cir. 1991). Furthermore, we reject claimant's contention that, since the administrative law judge credited his testimony to award benefits on October 3, 1986, he erred by not crediting claimant's testimony on all other days of alleged injury-related absence. Contrary to claimant's contention, the administrative law judge did not credit claimant's testimony. He found that claimant's allegation of an injury-related absence was supported by Dr. Gwathmey's August 13, 1986, disability slip, and by employer's attendance records showing injury-related absences shortly before and after the alleged date of disability, and employer's voluntary payment of compensation for these absences. *See* Ex. 6 at 3; Ex. 10 at 10, 12. The administrative law judge's inference from the medical evidence and employer's records that claimant was disabled on October 3, 1986, is supported by substantial evidence, is rational, and it is therefore affirmed. *See Perini*, 306 F. Supp. at 1324-1327. Accordingly, the administrative law judge's award of benefits for temporary total disability on October 1 through October 4, 1984, October 7, 1985, October 3, 1986 and May 14, 1987, is affirmed.

Claimant next argues that the administrative law judge erred by denying compensation for temporary partial disability, 33 U.S.C. §908(e), due to a loss of overtime from August 1, 1986, and continuing. The administrative law judge found that claimant sustained a second work-related injury on July 25, 1986, when he aggravated his wrist condition at work. The administrative law judge determined that claimant was entitled to compensation after the date of injury based on claimant's average weekly wage on July 25, 1986, which he found was $376 based on the weighted average of claimant's hourly rate of pay during the year prior to the second injury. Claimant's contention that he sustained a loss of overtime was rejected. In his Supplemental Decision and Order, in response to claimant's motion for reconsideration, the administrative law judge found claimant's evidence of lost overtime speculative and lacking in specificity, and that claimant's testimony of available overtime was not credible. He credited employer's witnesses, whom he found credible, and concluded that claimant did not sustain a loss of wage-earning capacity as a result of the July 25, 1986, injury due to a loss of overtime hours.

Overtime should be considered in determining claimant's average weekly wage at the date of injury when it is a regular and normal part of claimant's employment. *Brown v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 110, 112 (1989). Accordingly, claimant is entitled to compensation if he establishes a loss of overtime hours attributable to the work injury. *See Peele v. Newport News Shipbuilding and Dry Dock Co.*, 20 BRBS 133, 136-137 (1987). Although claimant

may be employed in alternate employment after returning to work from his injury, a loss of overtime hours may be established if claimant lost previously available overtime due to his work injury. *See Brown*, 23 BRBS at 112-113.

In the instant case, the administrative law judge based claimant's average weekly wage on the weighted average of claimant's hourly rate of pay in the year prior to claimant's wrist injury on July 25, 1986. The administrative law judge, however, did not address claimant's contention that his pre-injury average weekly wage should also reflect his pre-injury overtime earnings. *See Bury v. Joseph Smith and Sons*, 13 BRBS 694 (1981). In this regard, the record establishes that claimant worked 235 overtime hours in the year prior to his injury. Ex. 7 at 12. In his Supplemental Decision and Order, the administrative law judge found that claimant failed to establish a loss of overtime hours by crediting the testimony of employer's witnesses. Claimant's supervisor in the Material Control Department, Raymond Anthony, did not testify, however, to the relevant issue of the availability of overtime hours in claimant's pre-injury employment as a pipefitter. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). He testified that overtime hours are not available in claimant's subsequent employment in the Material Control Department. Tr. at 81, 89-90. Accordingly, we hold that the administrative law judge erred by not considering the overtime hours claimant worked prior to the July 25, 1986, injury in determining average weekly wage, and evidence that claimant sustained a loss of wage-earning capacity from the loss of overtime due to the injury. *See Brown,* 23 BRBS at 113; *see also Everett, 23 BRBS at 320-321.* Accordingly, we vacate the administrative law judge's denial of benefits for temporary partial disability. On remand, the administrative law judge shall address the evidence of overtime work relevant to a determination of claimant's average weekly wage and to whether claimant sustained a loss of wage-earning capacity due to a loss of overtime hours subsequent to the July 25, 1986 work injury.

Finally, claimant contends that the administrative law judge erred by finding that employer's issuance of a Foreman's Warning on May 14, 1987, did not violate Section 49 of the Act. Claimant argues that the administrative law judge erred by not finding that employer discriminated against him for his filing of a claim based on his finding that claimant was absent from work on May 14, 1987, due to his wrist injuries. The administrative law judge credited employer's records and the testimony of claimant's supervisor in the Material Control Department to find that there was a factual basis to support employer's issuance of a Foreman's Warning for claimant's repeated absences from work, that the supervisors who issued the warning did not know at the time that a claim had been filed under the Act, and that claimant was not treated differently from employees who had not filed claims and who also were repeatedly absent from work. In his Supplemental Decision and Order, the administrative law judge reiterated his finding that claimant did not receive a warning because of his injury-related absence on May 14, 1987, but that employer had reprimanded claimant pursuant to its Regulation 22 for repeated absences from work during the two months prior to May 14, 1987.[2]

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[2]Claimant's supervisor on May 14, 1987, Larry Johnson, testified that a Regulation 22 warning for excessive absences is not issued when the employee is absent due to a work-related injury. Tr. at 117-118. The supervisor, however, may require a doctor's note the next day to support the absence as related to a work injury. Tr. at 119-120. Mr. Johnson also testified that the warning may be

In order to establish a *prima facie* case of a Section 49 violation, claimant must establish that employer committed a discriminatory act motivated by discriminatory animus or intent. *See, e.g.*, *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). The administrative law judge may infer animus from circumstances demonstrated by the record. *See, e.g.*, *Williams v. Newport News Shipbuilding & Dry Dock Co.,* 14 BRBS 300 (1981). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has stated that "[p]roper matters for inquiry in a Section 49 claim are whether compensation claimants, individually or as a class, are treated differently from like groups or individuals, and whether the treatment is motivated, in whole or in part, by animus against the employee(s) because of compensation claims." *Holliman v. Newport News Shipbuilding & Dry Dock Co.,* 852 F.2d 759, 761, 21 BRBS 124, 128-29 (CRT)(4th Cir. 1988), *aff'g* 20 BRBS 114 (1987).

In the instant case, the administrative law judge's findings that claimant was repeatedly absent prior to May 14, 1987, that claimant's supervisors were not aware he had filed a claim prior to issuing the warning, and that claimant was not treated differently from similar employees who had not filed a claim under the Act are supported by substantial evidence. *See* Ex. 7 at 4, Ex. 8, Tr. at 101-102, 105-106, 109-112, 117-120. The essence of discrimination is in treating claimant differently than others. *Jaros,* 21 BRBS at 30. The administrative law judge rationally credited evidence establishing that claimant was not treated differently than similar employees who had not filed a claim under the Act. *See Perini*, 306 F. Supp. at 1324-1327. Accordingly, as his finding is rational and supported by substantial evidence, we affirm the administrative law judge's rejection of claimant's allegation that employer acted in violation of Section 49 when it issued claimant a Foreman's Warning pursuant to its regulations for repeated absences from work. *Holliman*, 852 F.2d at 762, 21 BRBS at 127 (CRT).

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issued regardless of the cause or whether the employee informed his supervisor in advance that he would be absent. Tr. at 103, 111-112, *see also* Tr. at 113-114. The purpose of the warning is to inform the employee in writing that the employer considers the employee's repeated excused or unexcused absences problematic. Tr. at 101.

Accordingly, the administrative law judge's denial of benefits for temporary partial disability is vacated and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge