BRB Nos. 97-1120
and 97-1120A

JOHN L. COLBERT	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
CDI AIRCRAFT MAINTENANCE	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, c/o CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
McDONNELL DOUGLAS CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Order Dismissing McDonnell Douglas Corporation of Quentin P. McColgin, and the Decision and Order-Awarding Benefits of Richard D. Mills, Administrative Law Judges, United States Department of Labor.

John L. Colbert, Slidell, Louisiana, *pro se*.

Thomas W. Thorne, Jr. (Lemle & Kelleher, L.L.P.), New Orleans, Louisiana, for employer CDI Aircraft Maintenance/carrier.

Douglas E. Winter and William C. Edgar (Bryan Cave L.L.P.), Washington, D.C., for McDonnell Douglas Corporation.

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

PER CURIAM:

Claimant, without representation, appeals the Order Dismissing McDonnell Douglas Corporation of Administrative Law Judge Quentin P. McColgin and the Decision and Order-Awarding Benefits (95-LHC-1191 and 95-LHC-1192) of Administrative Law Judge Richard D. Mills 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). Employer CDI Aircraft Maintenance (CDI) cross-appeals the Decision and Order-Awarding Benefits. In an appeal by a *pro se* claimant, the Board will review the findings of fact and conclusions of law of the administrative law judge which must be affirmed if they 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).

Claimant worked for employer as an aircraft mechanic in Zaragosa, Spain, under an employment contract with CDI for an 18 month period beginning on September 13, 1992. CDI had been subcontracted to refit airplanes for the carrying of new weapons under a general contract by McDonnell Douglas Corporation. Claimant injured his knee on June 19, 1993, when he was attempting to move a pylon and caught his foot on a table. Claimant continued to work with his knee injury, but left Spain on August 19, 1993, to return to the United States for treatment. After seeking treatment for his knee injury, claimant learned that he had suffered a work-related umbilical hernia which remained asymptomatic.[1] Claimant has not returned to work. Employer voluntarily paid temporary total disability benefits from September 16, 1993, to September 7, 1994, and permanent partial disability benefits under the Act pursuant to the schedule for an 8.5 percent impairment to claimant's knee. Claimant sought temporary total disability benefits due to his hernia.

[1]Claimant suffered his hernia in April 1993 when he was lifting a pylon and felt a sharp pain and pulling in the pit of his stomach which subsided and was thought to be a muscle strain. Cl. Ex. 2.

Initially, the claim included McDonnell Douglas Corporation (MDC), the contractor, as responsible employer. In an order dismissing MDC, Administrative Law Judge McColgin found that there was evidence, including claimant's employment contract and CDI's compensation insurance documents, that the subcontractor CDI, and not MDC, was claimant's actual employer and had properly secured compensation insurance. *See* Order Dismissing McDonnell Douglas Corporation and Order Denying Motion for Reconsideration. Moreover, Judge McColgin found that claimant offered no conflicting evidence and thus he granted summary judgment for MDC on the responsible employer issue. Claimant appealed this order to the Board, which dismissed the appeal as interlocutory on May 21, 1996.[2] Meanwhile, a hearing on the merits was conducted on September 14, 1995, by Judge McColgin. On October 29, 1996, the parties were notified that Judge McColgin was no longer with the Office of Administrative Law Judges (OALJ), and that the case would be reassigned. They were requested to respond whether they wished a new formal hearing or for the case to be decided on the evidence of record. Employer requested a decision on the record while claimant stated that "in the future" he would want a new hearing once the OALJ "regained" jurisdiction as claimant alleged jurisdiction was properly with a United States District Court. In a show cause order, Administrative Law Judge Mills gave claimant the opportunity to describe any issues of credibility which might warrant a new hearing. Claimant did not address this order, but instead he alleged bias due to the absence of MDC from the proceedings. The administrative law judge found that a new hearing was not warranted and dismissed the allegation of bias.

In his decision on the merits, Administrative Law Judge Mills (the administrative law judge) found that it was undisputed that claimant suffered a work-related injury to his knee on June 28, 1993, and that claimant suffered a hernia during the course and scope of his employment. The administrative law judge also found that claimant's hernia did not prevent him from performing the usual duties he performed with employer, and thus, he is not disabled due to the hernia. In determining claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge found that claimant's per diem of $30 is includable, but that the airline tickets to the worksite are not. Moreover, the administrative law judge found that the cost of the car driven by claimant in Spain was not easily ascertainable, and that the cost of his training was a fringe benefit. Thus, these were not includable in claimant's average weekly wage. However, the administrative law judge found that claimant's completion bonus was not contingent on future performance and is thus includable, and that the $1,000 bonus in lieu of an airline ticket home for vacation is includable. The administrative law judge included all the wages claimant earned for employer, including several weeks' post-injury wages and found claimant entitled to permanent partial disability benefits based on an average weekly wage of $904.77. The administrative law judge also found that claimant failed to show that employer treated him differently from other employees as a result of his claim under the Act, and thus, claimant did not establish evidence of discrimination pursuant to Section 49 of the Act, 33 U.S.C. §948a.

Claimant, without legal representation, contends on appeal that Judge McColgin erred in

[2]Claimant appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which dismissed the appeal on September 16, 1997.

granting summary judgment dismissing MDC as responsible employer.[3] With regard to Judge Mills's decision, claimant argues that Judge Mills did not have jurisdiction over the claim, that Judge Mills erred in his extent of disability findings, that he erred in his finding that employer did not discriminate against claimant pursuant to Section 49, and that he miscalculated claimant's average weekly wage. CDI cross-appeals the administrative law judge's determination of claimant's average weekly wage.

Initially, claimant contends that Judge McColgin erred in granting summary judgment dismissing MDC as responsible employer. Claimant contends that MDC was liable both as general contractor and as borrowing employer. The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(d), 18.41. Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Hall*, 24 BRBS at 1. In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion. *Hahan v. Sergeant*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

In the instant case, the Judge McColgin found that there was evidence, including claimant's employment contract and the contract between CDI and MDC, that CDI was claimant's statutory employer, and that CDI, as subcontractor, had properly provided for compensation insurance. 33 U.S.C. §904. Claimant offered no contrary evidence or witnesses, and CDI did not contest its liability. Thus, the administrative law judge concluded that there were no grounds to hold MDC liable and it was dismissed as responsible employer. As claimant offered no conflicting evidence, and Judge McColgin's decision is supported by substantial evidence and in accordance with law, we affirm his finding that there was no genuine issue of fact and thus affirm the order of summary judgment dismissing MDC as responsible employer. *See Hall*, 24 BRBS at 4; *see generally Meagher v. B.S. Costello, Inc.*, 20 BRBS 151 (1987), *aff'd*, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989).

[3]MDC responds urging affirmance of the administrative law judge's grant of summary judgment dismissing MDC.

Claimant also contends that he was denied due process as he was not allowed a hearing with all relevant parties, (*i.e.*, MDC) present. However, claimant did participate in a full evidentiary hearing before an administrative law judge with CDI represented as responsible employer. Moreover, after Judge McColgin's departure, Judge Mills gave claimant the opportunity to raise any issues of credibility, in order to determine whether a new hearing before him was required or whether the case could be decided on the existing record, but claimant did not respond. As claimant failed to identify issues of credibility when given the opportunity, we affirm the administrative law judge's finding that claimant waived his right to a *de novo* hearing before Judge Mills.[4] *Pigrenet v. Boland Marine and Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981)(*en banc*), *vacating* 631 F.2d 1190, 12 BRBS 710 (5th Cir. 1980).

[4]In addition, we reject claimant's contention that the administrative law judge did not have "jurisdiction" over the claim in the absence of MDC as we affirm Judge McColgin's finding that MDC was properly dismissed. We note that in any event, the determination of the responsible employer has no effect on claimant's entitlement, as it affects the source of claimant's benefits and not the amount. CDI accepted liability, and claimant has no basis for a separate claim against MDC.

Claimant further contends on appeal that he has not been released to his previous employment without restrictions related to his hernia. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In the instant case, the administrative law judge rationally relied on the fact that no physician of record opined that claimant cannot return to his usual employment due to his hernia, and that the hernia was asymptomatic. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not entitled to disability compensation for his hernia injury.[5] *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant next contends that the administrative law judge erred in finding that employer did not discriminate against claimant in violation Section 49 of the Act, 33 U.S.C. §948a. Claimant contends that the evidence establishes that he was suspended for filing a claim under the Act. Section 49 provides in pertinent part that an employer may not discriminate against an employee who has either claimed or attempted to claim compensation under the Act from the employer. 33 U.S.C. §948a. 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 Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 178 (1996). The essence of discrimination is in treating the claimant differently than other employees. *Id.*; *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

The administrative law judge in the instant case found that employer did not violate Section 49 of the Act when it suspended claimant on August 27, 1993. Claimant had been issued a formal reprimand which stated, "You are hereby reprimanded for non-compliance with the Contractor Field Team attendance policy. Since January 4, 1993, you have been absent a full or partial day on 23 occasions. Any further unexcused absences could result in disciplinary action taken against you, up to and including termination of employment." Emp. Ex. 9 at 2. The administrative law judge found that there was no evidence that claimant was suspended for any reason other than those enumerated by employer in the suspension notice and the formal reprimand. As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the finding that the suspension was not a violation of Section 49.[6] *See Holliman v. Newport News Shipbuilding & Dry Dock Co.*,

[5]We reject claimant's contention that he has been denied medical treatment, as it is undisputed that surgery by claimant's choice of physician to repair the hernia has been authorized by CDI.

[6]Claimant also alleged that employer violated Section 49 by refusing medical treatment in the United States and by refusing to hire claimant back to his pre-injury job. However, claimant conceded that employer refused to send any employees home for medical treatment, and thus all employees were treated similarly. Moreover, claimant's contract has expired, and claimant offered no proof that he is being treated differently than other applicants for rehire. Thus, we affirm the administrative law judge's finding that claimant failed to establish a violation of Section 49 on these grounds. *Manship*, 30 BRBS at 178.

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).

Lastly, claimant contends that the administrative law judge erred in his determination of claimant's average weekly wage. Claimant contends that the administrative law judge failed to add the $30 per diem, and that $950 a month for a car allowance should be added to his average weekly wage. On cross-appeal, CDI contends that the administrative law judge erred in his determination of claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), as the administrative law judge included wages claimant earned after his injury.

The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c).[7] *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). The object of Section 10(c) is to reach a fair and reasonable approximation of claimant's annual earning capacity. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The administrative law judge in the instant case included in average weekly wage the wages claimant earned in the 49 weeks he worked under his employment contract, including the weeks claimant worked after the knee injury, but before he left to seek treatment for the knee. The administrative law judge also added his bonuses of $3,996.75, and stated that the $30 per diem is includable in average weekly wage.

We reject employer's contention that the administrative law judge erred in including claimant's post-injury wages in the calculation of claimant's average weekly wage as he reasonably concluded that all of claimant's wages earned under the employment contract represent a fair approximation of what claimant could have earned for the contract term had he not been injured. *Id.* We also reject claimant's contention that the administrative law judge erred in not including the value of the car as he found it was not readily ascertainable. The administrative law judge rationally declined to credit the hearsay testimony of CDI's foreman, which he found merely concerned the number of cars in the fleet and the approximate cost of the total fleet.[8] *See generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 26(CRT) (5th Cir. 1989). Moreover, while we agree with

[7]Contrary to claimant's contention, Section 10(a) is inapplicable as the record does not reveal the number of days claimant worked. *See, e.g., Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

[8]We also affirm the administrative law judge's findings that the airline tickets used for travel between claimant's home and his work site are not includible in determining his average weekly wage as they are not compensation for services rendered, and that the training claimant received at the expense of employer at the estimated cost of $15,000 was a fringe benefit, and thus specifically excluded under Section 2(13) of the Act, 33 U.S.C. §902(13)(1994).

the administrative law judge that claimant's $30 per diem is properly included in average weekly wage, *see generally Quinones v. H.B. Zachery, Inc.*, ___ BRBS ___, BRB No. 97-0688 (Feb. 10, 1998), we note that his calculation does not take the per diem into account.[9] We therefore modify the administrative law judge's decision to reflect that claimant's average weekly wage is $1,114.77 ($904.77 + $210).

[9]Claimant's actual wages for employer of $40,337.07, plus the bonuses of $3,996.75, equals $44,333.82. This sum, divided by 49, equals $904.77.

Accordingly, claimant's average weekly wage is modified to $1,114.77.[10] The Order Dismissing McDonnell Douglas Corporation and the Decision and Order-Awarding Benefits are otherwise affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[10]Thus, claimant is entitled to additional benefits for temporary total disability and permanent partial disability as awarded by the administrative law judge, subject to the applicable maximum rates. 33 U.S.C. §906(b)(1).