BRB No. 08-0530

D.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTAINER FREIGHT STATION, INCORPORATED	)	DATE ISSUED: 02/27/2009
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

William S. Vincent, Jr., W. Jared Vincent and V. Jacob Garbin (The Law Office of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Jon B. Robinson and Robert N. Popich (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-572) 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 filed a claim for a work-related accident that occurred on November 1, 2002. Claimant contended he injured his left shoulder in the accident. Employer controverted the claim, and the case proceeded to a formal hearing before an administrative law judge. Prior to the issuance of a decision, the parties agreed to settle the claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Employer agreed to pay claimant a sum of $32,500, of which the parties apportioned $7,500 for disability benefits and $25,000 for past and future medical benefits, including the cost of further surgery recommended by Dr. Johnston. The settlement agreement also stated that the parties stipulated and agreed that claimant "alleged" to be totally disabled from any and all longshore employment until such time as he undergoes the shoulder surgery recommended by Dr. Johnston and until Dr. Johnston releases him for longshore work following the surgery. This settlement was approved by the administrative law judge on July 21, 2004.

Subsequently, claimant attempted to return to work as a longshoreman. He applied for registration with Mid-Gulf Association of Stevedores (Mid-Gulf), which is responsible for the issuance of registration cards with the International Longshoremen's Association (ILA). These cards bear an individual's seniority classification and are necessary for union employment on the waterfront. Following an investigation into claimant's physical abilities, including an inquiry to employer, Mid-Gulf denied claimant's application for a registration card. Claimant filed a claim under the Act, contending that employer discriminated against him in violation of Section 49, 33 U.S.C. §948a, for pursuing a disability claim.

In his Decision and Order, the administrative law judge found that claimant failed to establish discrimination by employer or carrier's authorized agent, Mr. Arceneaux, and thus denied the Section 49 claim. Specifically, the administrative law judge found that there was no evidence that employer engaged in a "systematic theme of discrimination" or that employer intended to force claimant to have shoulder surgery "whether it was medically necessary or not." Decision and Order at 12.

On appeal, claimant contends the administrative law judge erred in finding the evidence does not establish that employer discriminated against claimant by providing information blocking his registration with the union. In addition, claimant contends he did not expressly consent to the clause in the settlement agreement restricting his return to work. Employer responds, urging affirmance as no discriminatory action was established.

We reject claimant's contentions regarding the validity of the clause restricting claimant from returning to work until he undergoes the recommended surgery and that this clause establishes that employer discriminated against him based on his claim, in

violation of Section 49. By order dated July 21, 2004, the administrative law judge approved the settlement agreement for the claimed injury of November 1, 2002, pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Emp. Ex. 4. This order was not appealed and, thus, became final 30 days thereafter. 33 U.S.C. §921(a); 20 C.F.R. §702.350. Claimant cannot collaterally attack the clause in the settlement agreement merely by alleging he did not agree to the clause or that the return to work clause on its face violates Section 49 of the Act. *See generally Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied*, 528 U.S. 1184 (1999); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

We also reject claimant's contention that employer acted in a discriminatory manner by interfering with his employment with other employers subject to the collective bargaining agreement and thus violated Section 49 of the Act. Section 49 provides that an employer may not discriminate against an employee who has either claimed or attempted to claim compensation under the Act. To prevail on a claim filed pursuant to Section 49, a claimant must initially 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); *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 essence of discrimination is treating the claimant in a disparate manner from other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). Once these threshold elements are established, employer may defeat the claim by demonstrating that its action was not motivated, even in part, by claimant's exercise of his rights under the Act. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

Mid-Gulf is a multi-employer bargaining unit for member companies that are party to two ILA collective bargaining agreements. Mr. Jumonville, Mid-Gulf's president, testified that when an individual has been off work for six months, or does not work the minimum hours for that period, they must be reregistered through Mid-Gulf for employment with the member companies. With regard to claimant's request for registration, Mr. Jumonville testified that he had not received any medical information with claimant's application to receive a registration card, and he thus sought information regarding any prior injuries from the member companies. H. Tr. at 131. He stated that, as a matter of routine, Mid-Gulf sent an e-mail to the member companies asking if the applicant, claimant, had been hurt at their facilities. *Id.* at 110 132; Cl. Ex. 6. He received a reply e-mail from employer's representative, Mr. Arceneaux, stating that claimant and employer had reached a settlement agreement for a right shoulder claim. Mr. Arceneaux also stated that claimant should not be allowed "to return to the waterfront" until the conditions of the settlement agreement were met. *Id.* at 133; Cl. Ex.

6. Mr. Jumonville testified that he rejected claimant's request for a registration card because claimant had stipulated in the settlement agreement that he was permanently and totally disabled from longshore employment until he had the recommended shoulder surgery, and he did not submit any contrary evidence with his application. He stated that his decision was not directed or influenced by employer's representative, but was in accordance with the collective bargaining agreement. H. Tr. at 116. This decision was not appealed or grieved by claimant's union.[1] *Id.* at 136. Moreover, Mr. Jumonville testified that claimant could work under the bargaining agreement if he could provide medical information that he is physically able to return.[2] *Id.* at 127.

The administrative law judge credited Mr. Jumonville's testimony that his decision to deny claimant's request for registration was based solely on his assessment of claimant's physical ability to perform the required duties given the settlement language and the absence of contrary evidence. Moreover, the administrative law judge did not find evidence to support claimant's allegation that Mr. Arceneaux subverted the application process because of his belief that claimant did not injure himself at employer's facility. The administrative law judge relied on Mr. Jumonville's testimony that Mr. Arceneaux did not request that claimant be denied a registration card.

These credibility determination are within the administrative law judge's sound discretion. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). In *Powell v. Nacirema Operating Co.*, 19 BRBS 124 (1986), the Board affirmed the administrative law judge's finding that employer violated Section 49 in a case in which employer discharged a claimant who had returned to work after agreeing in a Section 8(i) settlement that he was permanently totally disabled. The administrative law judge's finding that the employer's discharge of the claimant was discriminatory was based on testimony that gang members usually were discharged only for contractual

[1] The Union is the party that filed the request for registration on claimant's behalf. H. Tr. at 116.

[2] In his brief, claimant refers to evidence that was submitted post-trial to support his contention that there was medical evidence that he could return to his former duties without the recommended surgery. This evidence was rejected by the administrative law judge in accordance with his July 19, 2007 Order Imposing Sanctions on Claimant, and additionally on the basis that the documents were not authenticated. *See* Cl. Exs. 1-5, 7 (rejected). This evidentiary ruling is not challenged on appeal. We, therefore, will not address claimant's contentions which rely on this evidence. *See generally Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988); *see also Milam v. Mason Technologies*, 34 BRBS 168 (2000)(McGranery, J., dissenting on other grounds).

violations and that an employee with a similar medical condition was allowed to work. The administrative law judge also found that claimant performed his duties satisfactorily after his return to work and that the medical evidence regarding his ability to work was ignored. Thus, the administrative law judge concluded that the discharge, based on claimant's risk of reinjury or of injuring others, was pretextual. The administrative law judge inferred animus, due to the claimant's claim, based on testimony from employer's representation that he was "irate and indignant" at being required to employ a "totally disabled" person. *Id.* at 126.

In contrast, in this case, the administrative law judge rationally credited testimony from Mr. Jumonville and Mr. Arceneaux establishing that claimant was not treated any differently than any other employee seeking a registration card. The administrative law judge could properly rely on Mr. Jumonville's testimony that Mid-Gulf's inquiry into an applicant's prior injuries is the same in every case and that claimant would be "welcomed back" if he furnished medical information that he is physically able to return to work on the waterfront. Decision and Order at 14. Moreover, Mr. Arceneaux testified that his response to the e-mail from Mid-Gulf was no different from any responses about similar employees regarding applications for reinstatement after injury or medical disability. H. Tr. at 79. Based on this credited evidence, the administrative law judge rationally found that claimant was not treated in a manner disparate from other employees and thus claimant failed to establish an act of discrimination by employer. *See generally Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). As claimant failed to establish an essential element of his claim, we affirm the administrative law judge's denial of claimant's Section 49 claim. *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988).

Accordingly, the Decision and Order of the administrative law judge denying Section 49 relief is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge