BRB No. 92-0375

THOMAS G. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Section 49 Relief of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Andrew M. Jones, Mobile, Alabama, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Section 49 Relief (89-LHC-3143) of Administrative Law Judge James W. Kerr, 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 findings of fact and conclusions of law of the administrative law judge 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, while working as a second shift supervisor for employer, sustained an injury to his back on September 17, 1985. Claimant subsequently underwent five surgical procedures. Claimant was determined to have reached maximum medical improvement on January 13, 1987, at which time he was released to return to work as a supervisor.[1] CX 3 at 1; EX 5 at 1. Claimant attempted to

[1]Claimant was given a twenty-five percent permanent partial disability rating on the basis of the excision of a disc at L4-5 and L5-S1 and after having had a transverse process fusion of L4 to the sacrum. Claimant's physical restrictions included only intermittent sitting, no heavy lifting, climbing, twisting, or bending. Dr. Enger concluded that claimant could do the work of a supervisor but there was "no way he will ever go back to his tools." Letter of July 21, 1987, CX 3.

return to work on January 20, 1987, *see* CX 4; EX 1, but was informed that his supervisory position was no longer available, that there were no positions available within his medical restrictions, and that no positions were anticipated in the future. *Id.* Claimant and employer thereafter entered into an agreement to settle this claim. This settlement was approved by the district director on June 5, 1987, and claimant received a payment of $65,000 by July 17, 1987. CX 1 at 1-2. On August 19, 1987, claimant received an employee separation form from employer stating that claimant was being discharged since he had resigned, that he had not returned to work after an approved leave of absence, and that his termination had been requested by workers' compensation. CX 2. Claimant thereafter challenged his removal from employer's employment roles by filing a claim pursuant to Section 49 of the Act, 33 U.S.C. §948a.

In his Decision and Order, the administrative law judge found that claimant's discharge was not in violation of Section 49, and thus denied claimant's claim. On appeal, claimant contends that the administrative law judge erred in finding that his discharge on August 19, 1987, was not in violation of Section 49. Employer responds, asserting that the administrative law judge's Decision and Order should be affirmed.

Section 49 provides, in part, that:

> It shall be unlawful for any employer ... 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. In order to establish a *prima facie* case of a Section 49 violation, the claimant must establish that the 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). Once claimant has met his burden, a rebuttable presumption arises that employer was motivated at least in part by claimant's filing of a claim. The burden then shifts to employer to prove that it was not motivated, even in part, by claimant's exercise of his rights under the Act. *Jaros, supra*, 21 BRBS at 30. The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd on other grounds sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 300 (1981). Similarly, the circumstances of the discharge may be examined to determine whether employer's reasons for firing the employee are credible or a pretext for termination based on the filing of a compensation claim. *See Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978).

In the instant case, the administrative law judge, after finding that claimant demonstrated that employer discriminated against him by terminating his employment concluded that employer established that there was no discriminatory intent in its decision to remove claimant from its employment rules. *See* Decision and Order at 3-4. In support of this finding, the administrative law judge noted that employer had rehired and promoted claimant after prior injuries which had resulted

in claims for compensation,[2] that claimant's former position was not filled after claimant's 1985 injury due to a restructuring of the department, and that the next position available to claimant was that of a technician, which was not within the physical restrictions placed on claimant by his physician. *See Id.;* EX 2, 3. Specifically, in a memorandum dated April 22, 1987, Mr. Aldridge of employer's medical department stated that claimant attempted to return to work on January 20, 1987, but his former position was no longer available and that there were no light duty positions available or anticipated within his craft. *See* EX 1. On August 14, 1989, two years after claimant's termination, Mr. Cooper, an investigative administrator for employer, wrote that claimant was refused employment because his supervisory position was no longer available, that the only position available at that time was claimant's prior job as a technician which was not within his physical restrictions, and that claimant was terminated "for not returning to work following an approved leave of absence." *See* EX 2. Lastly, in a memorandum dated September 27, 1989, Mr. Porter stated that claimant's position was eliminated after he left on medical leave due to re-arrangement in operations structure. *See* EX 3. The administrative law judge found, therefore, that because employer had rehired claimant several times in the past and would have rehired him if there had been a position within his restrictions, there was no discriminatory intent in the decision by employer to terminate claimant; accordingly, the administrative law judge concluded that there could be no violation of Section 49.

Claimant argues on appeal that the administrative law judge's conclusion is not supported by the evidence upon which he relied. Claimant notes that employer's memoranda, while stating that claimant was not returned to his supervisory position because that position was no longer available, fails to indicate that he was terminated for that reason, and that these documents fail to refute claimant's demonstrated willingness to wait for a supervisor's position to become available, as evidenced by claimant's uncontroverted return to the jobsite on numerous occasions. *See* CX 4; EX 1. Lastly, claimant argues that the administrative law judge failed to account for the discrepancies set forth in employer's employee separation form sent to claimant, which stated that claimant had resigned, that claimant did not return to work following his approved leave of absence, and that claimant's termination had been requested by workers compensation. *See* CX 2.

We agree with claimant that the administrative law judge's failure to address the discrepancies contained in employer's documentation requires that this case be remanded for further consideration. Specifically, we note that the administrative law judge, although mentioning employer's employee separation form in his recitation of the documentary evidence, failed to reconcile the statements made in that document with employer's subsequent memoranda and claimant's testimony. For example, the notation on that form that claimant had both resigned and failed to return to work following his approved leave of absence is contrary to both claimant's testimony, *see* Tr. at 26, and employer's subsequent documentation that claimant had attempted to return to work. *See* EX 1, 2. Additionally, the administrative law judge failed to address the relevance of the statement "termination requested by workers' compensation" contained on that form, which was prepared one month after claimant settled his claim against employer. Based upon

[2]Claimant lost an eye in 1977, for which he received $35,000 to $37,000 in compensation, Tr. at 19-20; thereafter, in 1981, claimant lost the tip of his finger in a work-related accident for which he received approximately $1,300 in compensation. Tr. at 21.

the administrative law judge's failure to reconcile all the evidence before him regarding employer's decision to terminate claimant one month after claimant settled his claim arising under the Act, we conclude that remand of this case to the administrative law judge is necessary,

On remand, the administrative law judge must consider all of the evidence of record regarding claimant's August 1987 termination, including employer's employee separation form, and he must reconcile how the statement "termination requested by workers' compensation" contained on that form, the affinity in time between claimant's settlement and his termination, and the other discrepancies in this notice and the subsequent memoranda produced by employer comport with his conclusion that employer has established that its decision to terminate claimant from its employment roles was not motivated by a discriminatory animus or intent.

Accordingly, the administrative law judge's Decision and Order Denying Section 49 Relief is vacated, and the case remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge