BRB No. 93-953

BETTY JEAN JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERMARINE, USA	)	
	)	DATE ISSUED:_____
and	)	
	)	
SIGNAL MUTUAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Herbert J. Chestnut (Herndon, Chestnut, Rosenblum & Ashby), Savannah, Georgia, for claimant.

Edward T. Brennan (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-2052) 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). 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 worked as a crew leader/laminator mixer building fiberglass catamaran minesweepers. Tr. at 19-21, 26. On October 18, 1990, she banged her right knee while exiting the ship. She testified she felt pain in her knee, leg and back, but continued to work. Tr. at 29-31. Dr. Sheils, claimant's treating physician, could not find anything wrong with her leg or knee. After several attempts to return to work and repeated visits to the doctor's office, claimant was released to return to work on March 31, 1991. Cl. Ex. 12; Tr. at 43. Dr. Sheils released claimant from his care

on April 22, 1991. Cl. Ex. 12.

Claimant returned to work on April 1, 1991, went to the doctor's office on April 2, worked on April 3, then stopped working citing leg pain. Emp. Ex. 9b; Tr. at 43-45. Claimant testified she called into work everyday pursuant to company policy. She filed a claim for compensation under the Act on April 19, 1991, and on April 25, 1991, without any warning, she was fired for "excessive absenteeism." Cl. Exs. 1, 4-5; Tr. at 48-51.

Claimant sought temporary total disability benefits, medical benefits, and reinstatement due to employer's violation of Section 49 of the Act, 33 U.S.C. §948a. At the formal hearing on this claim, employer conceded its liability for temporary total disability benefits from the date of injury through the date of termination. Decision and Order at 2. The administrative law judge rejected the doctors' reports which indicate that claimant's continued pain is due to nerve root entrapment; however, he found claimant to be a credible witness, and concluded based on her testimony that continued pain prevents her from returning to her usual job. Decision and Order at 7-9. Because the administrative law judge determined that employer failed to show good cause why it waited until one month before the hearing to contact a vocational rehabilitation expert, he refused to keep the record open for a labor market survey. Therefore, he concluded that employer failed to establish the availability of suitable alternate employment, and he held employer liable for temporary total disability benefits from the date of claimant's discharge, and continuing for the duration of her temporary total disability. *Id.* at 9. The administrative law judge also awarded medical benefits and interest and found that employer discharged claimant in violation of Section 49 because she filed a claim under the Act. He awarded claimant reinstatement to her job at the conclusion of her temporary disability, and he assessed a fine against employer in the amount of $5,000. *Id.* at 9-10. Employer appeals the administrative law judge's decision, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in failing to hold the record open for 30 days, pursuant to its request, for completion of a labor market survey establishing the availability of suitable alternate employment. The administrative law judge has considerable discretion concerning the admission of evidence. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); 20 C.F.R. §§702.338, 702.339. In this case, employer stated that its adjuster's illness and death caused the delay in the vocational rehabilitation process. The administrative law judge found that employer did not demonstrate good cause for waiting until one month before the hearing to engage a vocational rehabilitation expert given that the injury occurred 1.5 years prior to the adjuster's illness. Tr. at 83. We affirm the administrative law judge's discretionary refusal to hold the record open for evidence which could have been obtained at an earlier date. We note, however, that employer has filed with the Board a motion for modification of the administrative law judge's decision, attaching a labor market survey thereto. An award may be modified upon the showing of the availability of suitable alternate employment. *See* 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144 (1995); *Blake v. Ceres, Inc.*, 19 BRBS 219 (1987). Consequently, this case must be remanded to the administrative law judge for action on the motion.

Employer next asserts that the administrative law judge erred in holding it liable for temporary total disability benefits from the date of claimant's termination and continuing. There is no question but that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, as she has established that a work accident occurred and that she has an injury. In rebuttal, employer relies on medical reports which are silent as to the etiology of claimant's leg, knee, and back pain, and do not rule out her employment as a cause of her continuing problems. *See* Cl. Exs. 12-15. As employer has not established that claimant's employment did not cause, aggravate, or contribute to her injury, it has not presented sufficient evidence to rebut the presumption, and claimant's injury is work-related as a matter of law. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1264 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990).

Further, claimant has established a *prima facie* case of total disability by showing that she is unable to return to her usual work. *See 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). Specifically, the administrative law judge, as he is permitted to do, credited claimant's complaints of pain to conclude that she can not return to her usual work. *See Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). As claimant has shown an inability to return to her usual employment, and as employer has not presented evidence of suitable alternate employment on the existing record, we affirm the administrative law judge's finding that claimant has a temporary total disability.

Lastly, employer contends the administrative law judge erred in finding that it violated the provisions of Section 49 of the Act. To establish a *prima facie* case of discrimination, claimant must demonstrate that employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding and Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT) (4th Cir. 1988); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT) (D.C. Cir. 1988). The administrative law judge may infer animus from circumstances demonstrated by the record. *Brooks v. Newport News Shipbuilding and Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). In this case, claimant last worked on April 3, testifying that she called in each day thereafter. The administrative law judge accepted claimant's testimony, and company forms of record support her statement. Decision and Order at 9; Cl. Ex. 1. On April 19, claimant filed her claim and on April 25, she was discharged without any warning. The administrative law judge found that company policy to discourage "excessive absenteeism" is to progressively discipline the employee with warnings, a suspension, and eventually termination. *See* Tr. at 51-52, 54, 102. In light of employer's treatment of claimant and its failure to follow its own policy, we hold that the administrative law judge rationally determined that employer's discharge of claimant violated Section 49. *See Brooks*, 26 BRBS at 3. Consequently, we affirm his finding that claimant is entitled to reinstatement at the conclusion of her temporary disability based on employer's violation of the mandate against

discriminatory retaliation.[1]

Accordingly, the administrative law judge's Decision and Order is affirmed. The case is remanded to the administrative law judge for consideration of employer's motion for modification.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

[1]Employer's contention on this matter is interpreted as a request to reweigh the evidence. As the administrative law judge's conclusion is supported by substantial evidence, we reject employer's argument. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).