BRB No. 93-1122

MACAUTHOR SPENCER	)	
	)	
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 Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

MacAuthor Spencer, Fairfield, North Carolina, *pro se.*

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the aid of counsel, appeals the Decision and Order Denying Benefits (90-LHC-500) of Administrative Law Judge Michael P. Lesniak 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.) In reviewing this *pro se* appeal, the Board must affirm the administrative law judge's findings of fact and conclusions of law 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); 20 C.F.R. §§802.211(e), 802.220.

On July 25, 1988, claimant sustained various injuries when a machine fell onto him during the course of his employment with employer as a welder. Dr. Bobbitt, the company physician, diagnosed a contusion to claimant's cervical and dorsal spines and a right knee strain. Pursuant to Dr. Bobbitt's authorization, employer voluntarily paid claimant temporary total disability benefits from July 26, 1988 to September 18, 1988, and from September 23, 1988 to March 29, 1989. 33 U.S.C. §908(b). Claimant returned to work on March 29, 1989, and was assigned to light duty work, within his restrictions, in employer's MRA shop. On May 31, 1989, claimant was sent to requalify at welding school. Claimant testified that he was unable to do this work because it involved bending

and caused him back pain. Dr. Byrd saw claimant on June 12, 1989, and gave him a note indicating that claimant was unable to work from June 1 through June 12, 1989. On June 13, 1989, claimant submitted this note to employer, but did not report for work. Based upon Dr. Byrd's subsequent explanation that this note was not based on his having seen claimant during that time period or on any new medical evidence, and was issued solely at claimant's request, Dr. Bobbitt refused to accept this note authorizing claimant's absence from work. Thereafter, since claimant was absent from work for five consecutive days without authorization, employer terminated claimant retroactively as of June 1, 1990. Claimant subsequently filed a claim for total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was not totally disabled since claimant was capable of working within his restrictions after May 31, 1989, and employer established the availability of regular and continuous employment as a welder within claimant's restrictions. The administrative law judge further found that claimant's discharge was not in violation of Section 49 of the Act, 33 U.S.C. §948a.

Claimant, appealing without representation by counsel, seeks review of the denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). Employer can establish the availability of suitable alternate employment by offering claimant a light-duty position in its facility so long as the position is tailored to claimant's physical restrictions, and the job is necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In the instant case, the administrative law judge rationally credited the testimony of Mr. South, a welding superintendent for employer, in finding that the work assigned claimant at the welding school and the position available to claimant at employer's facility were both within claimant's restrictions. Additionally, the administrative law judge noted that every physician who examined claimant, specifically Drs. Bobbitt, Byrd, Shinco and Neff, agreed that claimant was capable of working within his restrictions. *See* EXS 12, 17-19, 22A-B, 23, CX 1. In crediting these opinions, the administrative law judge found that claimant's assertion of back pain sufficient to incapacitate him from performing light duty work at welding school was unsubstantiated and not credible. The administrative law judge is entitled to weigh the credibility of all witnesses and to draw his own inferences from the evidence. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Inasmuch as the administrative law judge's findings are rational and constitute substantial evidence in support of his ultimate findings regarding the extent of claimant's disability, we affirm the administrative law judge's determinations that claimant was capable of light duty work as of June 1, 1989, and that employer, as of that date, established the availability of regular and continuous work as a welder within claimant's restrictions, and his consequent finding that claimant is not temporarily totally disabled. *See Tann*, 841 F.2d at 540, 21

BRBS at 10 (CRT); *Peele*, 20 BRBS at 133.

Before the administrative law judge, claimant argued that his dismissal from this employer's facility constituted a violation of Section 49 of the Act.[1] 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 Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 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* 19 BRBS 261 (1987). 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).

In the instant case, the administrative law judge determined that claimant's discharge was based on his violation of the five-day rule encompassed in the labor agreement with employer and was unrelated to the filing of his compensation claim; specifically, the administrative law judge found that, pursuant to that rule, claimant had been dismissed because he had been absent for five consecutive days without authorization. In rendering this determination, the administrative law judge noted the testimony of Mr. Chittenden, employer's Supervisor of Personnel for the X-18 Welding Department, that he had never applied the provisions of the labor agreement differently to any other employee and that claimant's compensation claim played no part in his determination that the labor agreement had been violated. The administrative law judge further found no discriminatory animus in Dr. Bobbitt's refusal to authorize medical leave retroactively to cover claimant's absence in light of Dr. Byrd's admission that there was no medical basis for the leave slip that he issued to claimant wherein Dr. Byrd indicated that claimant was unable to work from June 1, 1989 through June 12, 1989. Thus, substantial evidence supports the administrative law judge's finding that employer's discharge of claimant was a result of his violation of a company rule. We therefore affirm the administrative law judge's determination that employer's discharge of claimant did not constitute a Section 49 violation. *See generally Holliman*, 852 F.2d at 759, 21 BRBS at 124 (CRT); *Geddes*, 851 F.2d at 440, 21 BRBS at 103 (CRT); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988).

Lastly, the administrative law judge, citing to 29 C.F.R. §18.6(d)(2), ordered claimant to reimburse employer sixty dollars to cover the cost of a court reporter in light of claimant's failure to attend a deposition even though he was under court order to do so. We note, however, that Section 18.6(d)(2) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges does not address the assessment of costs under such circumstances. Moreover, Section 28 of the Act, 33 U.S.C. §928, specifically states the circumstances under which

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[1]Section 49 provides in pertinent part that:

> It shall be unlawful for any employer . . . to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation . . . .

33 U.S.C. §948a.

an award of attorney's fees and costs may be rendered, and makes no reference to the assessment of costs incurred by employer against claimant. It is well-established that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, apply only to the extent they are not inconsistent with the Act or its implementing regulations, 20 C.F.R. Part 702. *See Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994); 29 C.F.R. §18.1(a). Thus, since the Act contains a specific provision for awarding attorney's fees and costs which does not authorize the assessment of employer's litigation costs against claimant, we conclude that the administrative law judge's assessment in this case is inconsistent with the Act. *See generally Bordelon*, 27 BRBS at 280. We therefore reverse the administrative law judge's assessment of costs in the amount of sixty dollars against claimant.

Accordingly, the administrative law judge's assessment of costs against claimant is reversed. In all other respects, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge