BRB No. 97-133

LINDON R. COLLINS	)	
	)	
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 of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Betty M. Tharrington (Rutter & Montagna), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason and Mason), Newport News, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-1127) of Administrative Law Judge Daniel A. Sarno, Jr., denying 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 findings of fact and the conclusions of law of the administrative law judge 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).

On April 22, 1991, claimant, a first class mechanic, suffered a work-related back injury while working for employer pulling cables. Following a course of conservative treatment in 1991, claimant was diagnosed as having a herniated disc at L3-4 for which Dr. McAdam performed surgery on February 3, 1992. On September 18, 1992, Dr. McAdam released claimant to return to full-time work with restrictions. Employer provided claimant with a lighter duty position, performing cable "banding" work in his former department at his pre-injury wage rate. On September 8, 1993, however, claimant failed to report to work, and he did not return until October 13, 1993, at which time employer requested that he provide medical documentation to excuse his absence, as is required pursuant to the "five

day absent without leave (AWOL)" rule set forth in Article 15, Section 3, of the applicable collective bargaining agreement (CBA). When claimant informed his supervisor that he did not have the required documentation with him, but that he had it at home, he was sent home and instructed to report to the personnel office with the medical documentation that same day. Claimant never provided the required documentation.

On October 22, 1993, employer sent claimant a letter informing him that he was being automatically terminated pursuant to Article 15, Section 3, of the CBA for being absent in excess of five continuous work days without medical authorization for his leave. Claimant grieved his dismissal, but the grievance was ultimately withdrawn by the union. Claimant sought temporary total disability compensation under the Act commencing September 8, 1993, and alleged that employer violated Section 49 of the Act, 33 U.S.C. §948a, by dismissing claimant in retribution for having filed a compensation claim.

The administrative law judge denied the claim for temporary total disability compensation, finding that employer provided claimant with a suitable light duty job within his restrictions at its facility. The administrative law judge further determined that claimant failed to establish that employer violated Section 49 of the Act, as the evidence demonstrated that employer terminated claimant based solely on his failure to provide medical documentation to support his extended absence from work in violation of the CBA, rather than for any reason relating to the filing of claimant's compensation claim. Claimant appeals the administrative law judge's denial of benefits on various grounds. Employer responds, requesting affirmance of the decision below.

On appeal, claimant initially argues that because the evidence of record demonstrates that employer required claimant to work outside of his restrictions, causing him significant pain and resultant loss of work on a number of occasions, including the period from September 9, 1993 to October 13, 1993, the administrative law judge erred in concluding that claimant's post-injury work for employer constituted suitable alternate employment. Claimant further avers that as the record unequivocally establishes that employer was aware that his absence from September 9, 1993, until October 13,1993, was related to his injury, since claimant called in each week to report that he was ill, yet discharged claimant based on swift, unconditional application of the "five day rule," the administrative law judge erred in failing to conclude that claimant's discharge was not due at least in part to discriminatory animus and in failing to afford claimant a remedy under Section 49.

We initially affirm the administrative law judge's determination that claimant's discharge in this case did not violate Section 49. In order to establish a *prima facie* case of discrimination under Section 49, 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, e.g., Williams v. Newport News*

Shipbuilding & Dry Dock Co., 14 BRBS 300 (1981).

Based on testimony provided by Mr. Williams, employer's supervisor of human relations, Tr. at 105-107, 110-111, the administrative law judge rationally found that claimant had been automatically terminated based solely on his violation of the terms of the five day AWOL rule contained in the CBA. Mr. Williams testified that Article 15, Section 3, of the contract provides for automatic termination where any worker, regardless of whether he is out of work because of a work-related injury, is on unauthorized leave for more than five days and fails to provide medical documentation to support his work absence upon his return to work. Mr. Williams further stated that he was unaware that claimant had filed a workers' compensation claim at the time he was terminated and that this factor played no part in his determination that termination was warranted. Tr. at 105, 110-111.[1] Inasmuch as Mr. Williams's testimony supports the conclusion that claimant was discharged for violating a rule in the collective bargaining agreement which is uniformly enforced against all employees, the administrative law judge's finding that claimant failed to establish discriminatory animus is supported by substantial evidence. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 178 (1996). Although claimant argues on appeal that in making this determination the administrative law judge failed to consider claimant's testimony that his absence from work from September 9, 1993, until October 13, 1993, was due to back pain caused by working beyond his restrictions, it is evident from the face of the administrative law judge's decision that he considered this testimony, but found claimant's assertion untenable given that claimant did not seek any medical treatment during the one-month period he was off work. Moreover, while claimant attempted to explain his failure to obtain the medical documentation mandated by Article 15, Section 3, by asserting that Dr. McAdams had refused to see him during his absence, the administrative law judge rationally rejected claimant's explanation.[2] Decision and Order at 5, n.3, 7. As the administrative law judge's finding that claimant was terminated because of his violation of a provision of the CBA, rather than because of any animus occasioned by

[1]The administrative law judge also found based on Mr. Abrams's testimony and documentation submitted by employer that claimant knew that when he returned to work he was required to have medical documentation from a physician excusing his time from work as he had been informed of this periodically by his supervisor at safety meetings and had been reminded of this requirement in writing. *See* Decision and Order at 4-5; Tr. at 96; EX-2, p. 13; EX-4.

[2]To the extent that claimant asserts that his termination was at least in part discriminatory because it was based upon excessive absences which were due to his work-related injury, we note that the fact that claimant's violation of a company rule may not have come to light but for his work-related injury, does not render his termination based on application of that company rule discriminatory. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 4-5 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); *see also Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, 369 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

the filing of his compensation claim, is rational and supported by the record, the administrative law judge's determination that employer did not violate Section 49 when it terminated claimant is affirmed. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

The administrative law judge's denial of claimant's claim for temporary total disability benefits is also affirmed. Where, as in the instant case it is undisputed that claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *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). One way that employer can meet this burden is by providing claimant with a suitable light duty job performing necessary work within its facility. *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). It is well-established that where employer provides claimant with a suitable job and claimant is terminated for reasons unrelated to his work-related disability, employer does not bear the renewed burden of showing other suitable alternate employment. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). In such a case, claimant is at most partially disabled, as his earnings in the suitable job may form the basis for the administrative law judge to determine claimant's wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In the present case, in considering whether claimant's post-injury work for employer was suitable, the administrative law judge initially noted that employer enforced the following restrictions on a permanent basis: limited ladder climbing, no lifting over 40-50 pounds, and no standing for 8 hours continuously without a break. In addition, he noted that the parties stipulated that claimant did not have any restrictions regarding pulling cables.[3] Decision and Order at 3-4. Based on claimant's testimony and that of his supervisor, Mr. Abrams, the administrative law judge rationally concluded that the post-injury cable banding work which claimant performed for employer was consistent with his work restrictions. The administrative law judge further noted that while claimant initially stated that he was required to lift deck gratings weighing in excess of 40 pounds, thereafter

[3] When Dr. McAdam released claimant to return to work he stated that claimant could return to work on an eight hour per day basis provided that he not engage in overhead work, not stand eight hours continuously without a break, and not lift more than 40 to 50 pounds. EX-8, p.13. Thereafter, claimant sought a second opinion regarding his work restrictions from Dr. Rinaldi, who, on December 14, 1992 reported that in addition to those restrictions imposed by Dr. McAdam, he would also impose a restriction regarding ladder climbing and pulling electrical cables, which at times are very heavy. CX-3. In a letter dated January 20,1996, Dr, McAdam stated that he believed that the restrictions made permanent by employer's clinic were reasonable and that claimant could pull cables as long as they did not weigh over 40 pounds. EX-8.

he provided varying accounts as to how much such a grate weighs; claimant ultimately conceded that he did know how much it weighed and that several people would often help in moving the grate. *Compare* EX.-10, p. 17 with Tr. at 42-44; Decision and Order at 4. Moreover, the administrative law judge stated that claimant had not convinced him that he was required to pull cables exceeding 40 pounds and determined that although claimant's main concern with performing the cable banding job appeared to be that it required prolonged periods of bending and crouching in confined spaces, claimant had no restrictions relating to such activities. Claimant also argues that the administrative law judge's decision does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), because he failed to consider claimant's unrebutted testimony regarding his pain. However, the administrative law judge did consider claimant's testimony in this regard but was not persuaded that the level of discomfort claimant experienced warranted additional restrictions beyond those actually imposed by claimant's physicians. *See* Decision and Order at 5-6.

The administrative law judge is free to accept or reject all or any part of any testimony according to his judgment. *Todd Shipyards Corp. v. Donovan*, 300 F.2d. 741 (5th Cir. 1962). Inasmuch as the testimony relied upon by the administrative law judge provides substantial evidence to support his finding that the alternate work which claimant performed at employer's facility post-injury constituted suitable alternate employment, and claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm this determination. As employer provided claimant with a suitable light duty job at its facility at his pre-injury wages which remained available to him but for the fact that he was terminated for violating a company rule, the administrative law judge's denial of claimant's claim for temporary total disability compensation is affirmed. *See Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 15-16 (1980).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL
Chief Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge