BRB No. 00-0940

MARCUS GARRETT	)	
	)	
Clamant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING INCORPORATED	)	DATE ISSUED: June 15, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision on Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

J. Elmo Lang (Lang & Ishee, P.A.) Pascagoula, Mississippi, for claimant.

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

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Decision on Claimant's Motion for Reconsideration (99-LHC-2208) of Administrative Law Judge C. Richard Avery 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 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).

Claimant experienced pain in his back and groin while attempting to lift a welding machine on March 21, 1996, and was subsequently diagnosed with a herniated disc at L4-5. Following a period of treatment with medication and physical therapy, claimant returned to work on April 8, 1996, and was assigned to light-duty work. Claimant was terminated for

excessive absenteeism according to the terms of the union contract on July 23, 1996.

In his decision, the administrative law judge found that although claimant could not return to his previous position with employer due to the medical restrictions arising from his work injury, employer had provided a modified position to claimant within those restrictions upon claimant's return to work following his injury. Moreover, the administrative law judge concluded that claimant was not terminated due to filing a claim under the Act. Accordingly, the administrative law judge denied the benefits sought by claimant.[1] Claimant's motion for reconsideration was subsequently denied by the administrative law judge.

On appeal, claimant challenges that the administrative law judge's denial of his claim for continuing disability benefits. Employer responds, urging affirmance.

Initially, claimant summarily contends that the job he performed upon returning to work following his injury was not suitable as it was not within his physical restrictions. 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 P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). An 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, the job is necessary and claimant is capable of performing it. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If employer establishes the availability of suitable alternate employment, the claimant is, at most, partially disabled. *Director, OWCP v. Bethlehem Steel Corp [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991).

In the instant case, the administrative law judge relied upon the testimony of Ms. Wiley, employer's employee relations representative, in finding that the modified position in the insulation department provided to claimant upon his return to work on April 9, 1996, was within claimant's restrictions. The administrative law judge specifically addressed claimant's contention that the duties of this position were outside of his restrictions and determined that the medical records, particularly the opinion of Dr. Manolakas, *see* EX 9, supported a conclusion that claimant was capable of performing the proffered position.

[1]The parties agreed that all compensation due prior to July 23, 1996, had been paid by employer; claimant seeks additional compensation following his termination.

Moreover, as noted by the administrative law judge, Ms. Wiley also testified that claimant never informed her of his inability to perform the proffered position until his termination hearing.

The administrative law judge is entitled to weigh the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Inasmuch as the administrative law judge's weighing of the evidence is rational and substantial evidence supports his finding regarding the extent of claimant's disability, we affirm the administrative law judge's determination that claimant was capable of light duty work as of April 9, 1996 and that employer, as of that date, established the availability of regular and continuous work within claimant's restrictions. We therefore affirm his conclusion that claimant is not temporarily totally disabled. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

Claimant next argues that the administrative law judge erred in finding that his dismissal from employer's facility did not constitute a violation of Section 49 of the Act.[2] Section 49 prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act. If the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a. To establish a *prima facie* case of discrimination, a claimant must 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), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT)(D.C. Cir. 1988), *aff'g Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987); *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 administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks*, 26 BRBS at 3. The essence of discrimination is in treating the claimant differently than other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). Once claimant has met his burden of proof, a rebuttable presumption arises

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[2]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.

that the employer was motivated at least in part by claimant's involvement in a claim under the Act.[3] 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. *Dunn v. Lockheed Martin Corp*., 33 BRBS 204 (1999).

This case is similar to *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998), in which the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises, affirmed an administrative law judge's determination that an employer did not act with discriminatory intent when it terminated an employee due to his failure to provide medical documentation despite repeated requests by employer. In the instant case, the administrative law judge determined that claimant's discharge was based on his violation of the absentee policy encompassed in the labor agreement with employer and was unrelated to claimant's injury; specifically, the administrative law judge found that, pursuant to that policy, claimant had been dismissed because of repeated unexcused absences.[4] In rendering this determination, the administrative law judge found that claimant had been afforded ample opportunity to provide excuses for his unexcused absences, but apparently chose not to do so. In this regard, the record reflects that employer recorded four unexcused absences by claimant following his last disciplinary

[3]Claimant's assertion that all doubtful questions of fact must be resolved in his favor, as his burden of proof is lighter than the preponderance of the evidence standard, is without merit in view of the decision of the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[4]The absentee policy in effect at the time of claimant's injury provided for a graduated series of disciplinary measures. In the instant case, the record reflects that claimant had previously received both warnings and a layoff for excessive absenteeism. *See* EX 15.

layoff and, pursuant to provisions of the absentee policy, such absences without documentation resulted in claimant's termination.[5]

Moreover, the record contains no evidence that claimant was treated differently from similar employees. Claimant bears the burden of establishing a discriminatory act motivated by animus, which requires that he show that he was treated differently, individually or as part of a class, from "like groups or individuals." *Holliman*, 852 F.2d 759, 21 BRBS 124(CRT); *Hunt v. Newport New Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). Claimant has not shouldered this burden, as he presented no evidence that he was treated differently from other employees violating employer's absentee policy. Thus, the record lacks evidence sufficient to meet claimant's initial burden under Section 49. In contrast, the record does contain evidence that employer terminated claimant because of his violation of an employment policy. Thus, as 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 and was not based upon the occurrence of a work-injury, we affirm the administrative law judge's determination that employer's termination of claimant did not violate the Act. *See Ledet*, 163 F.3d 901, 32 BRBS 212(CRT); *Holliman*, 852 F.2d at 761, 21 BRBS at 128-129(CRT); *Manship v. Norfolk & W. Ry. Co.* 30 BRBS 175 (1996).

Accordingly, the administrative law judge's Decision and Order and Decision on Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH

[5]We note claimant's assertion that employer should have considered three of these absences "excused" rather than "unexcused." Claimant's challenge to employer's entries, however, does not arise under the Act; rather, claimant should have challenged these entries during employer's disciplinary proceedings. The record reflects that claimant chose not to take this route. *See* HT at 66-68.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge