BRB Nos. 03-0200
and 03-0200A

RUBEN MORIN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Nov. 14, 2003
CONRAD INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER
Cross-Petitioner	)	

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Larry D. Dyess (Barry, Piccione & Dyess), New Orleans, Louisiana, for claimant.

Patrick E. O'Keefe and Scott R. Hymel (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2001-LHC-01978) of Administrative Law Judge Lee J. Romero, 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 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 was injured on September 26, 1998, during the course of his employment as a painting supervisor. Claimant was unfastening a sandblasting hose when the hose was unexpectedly turned on, which resulted in the discharge of pressurized coal slag onto claimant's face, chest, upper right side, hand, and elbow. Claimant also was knocked off his feet into the water where his back struck a boat. Claimant underwent multiple skin debridement procedures to remove embedded coal slag from his face. He also received treatment for neck and back pain. CXS 10, 14. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from September 26, to December 16, 1998, when claimant returned to modified work, with restrictions. An MRI taken on January 11, 1999, showed a ruptured disc at C5-6, and a bulging disc at C3-4. CX 7 at 3. Claimant's treating physician, Dr. Jackson, opined that claimant should not wear a hard hat, engage in any activity that strained his neck, or work more than 40 hours per week. *Id*. Claimant was treated conservatively with epidural injections, chiropractic treatment, and physical therapy until September 16, 1999, when employer declined to authorize further treatment. CXS 7, 12, 15, 17. Employer paid claimant compensation for temporary partial disability, 33 U.S.C. §908(e), due to loss of overtime from December 17, 1998, to November 3, 1999. Employer stopped its voluntary compensation payments based on a functional capacities evaluation (FCE), and the opinion of the evaluator that claimant could perform his usual employment. CX 18 at 1, 4; EXS 5, 6. In November 1999, claimant was assigned his pre-injury work duties.

On March 21, 2000, employer terminated claimant based on reports that claimant had demanded and accepted kickback payments from a subcontractor who provided laborers to the painting department. EX 14. Thereafter, claimant founded Brothers Innovative Painting (Brothers), a commercial and residential painting company. Tr. at 85-88. On September 14, 2000, claimant's treating physician, Dr. Jackson, noted that claimant had muscle atrophy of the upper right arm. Dr. Jackson recommended that claimant stop working until the results of another MRI are reviewed. CX 7 at 5, 10. An MRI taken on January 17, 2001, showed a ruptured disc at C5-6 with probable impingement on the C6 nerve root. Dr. Jackson recommended surgery to remove the disc and an anterior cervical fusion. CXS 7 at 5-6, 8. Dr. Jackson opined that claimant remained disabled until he receives this treatment for his neck condition. CX 7 at 7.

In his decision, the administrative law judge found that claimant performed suitable work until November 1999, when employer reassigned claimant to his usual work as a paint supervisor. The administrative law judge found that the duties of this position exceeded claimant's work restrictions as stated in the FCE and that claimant worked in pain. Accordingly, the administrative law judge awarded claimant compensation for temporary partial disability from November 3, 1999, to March 21, 2000. He found, however, that claimant is not entitled to any compensation after his termination. The administrative law judge awarded claimant $5,000 for facial

disfigurement due to the injury. The administrative law judge credited the opinion of Dr. Jackson, and he ordered employer to provide medical benefits for claimant's neck condition, including the recommended surgery. The administrative law judge next denied the wrongful discharge claim under Section 49 of the Act, 33 U.S.C. §948a. The administrative law judge found that claimant failed to establish a *prima facie* case of employment discrimination due to his filing a compensation claim, and that employer exercised its discretion by terminating claimant for soliciting and accepting kickbacks from a subcontractor.

On appeal, claimant argues that he is entitled to compensation for temporary total disability from the date of his termination on March 21, 2000, based on the administrative law judge's finding that claimant could not perform the physical tasks of his usual employment. Alternatively, claimant argues he is entitled to compensation for temporary total disability commencing September 14, 2000, when Dr. Jackson opined that claimant should not continue working due to his neck condition.[1] Claimant further argues that the administrative law judge erred by finding that claimant was fired for a legitimate business reason, and by denying claimant's claim of a discriminatory discharge for his filing of a compensation claim. BRB No. 03-0200. Employer responds, urging affirmance. In its cross-appeal, employer argues the administrative law judge erred by awarding claimant $5,000 for facial disfigurement. BRB No. 03-0200A. Claimant responds, urging affirmance.

We initially address claimant's appeal of the administrative law judge's finding that he is not entitled to compensation after he was terminated on March 21, 2000, for demanding and accepting kickbacks from Valentine Industrial Contractors (Valentine), which supplied laborers to employer's painting department. Claimant argues that he is entitled to continuing compensation from March 21, 2000, because the administrative law judge found that he was not physically able to return to his usual employment as a painting supervisor.

In his decision, the administrative law judge found that claimant could not perform the physical tasks of his usual employment as a paint department supervisor. The administrative law judge found that claimant's job duties required the lifting and carrying of objects weighing in excess of 70 to 100 pounds, climbing, maneuverability, and regular walking, that these duties exceeded claimant's capabilities, and that claimant

[1] Claimant also argues that, should employer cross-appeal the medical necessity of claimant's treatment for his neck condition, the administrative law judge erred by denying claimant's motion to submit post- hearing Dr. Jackson's medical records. Since employer did not cross-appeal the administrative law judge's award of medical benefits, we need not address claimant's contention.

worked in pain. Decision and Order at 32. Thus, the administrative law judge awarded claimant compensation for temporary partial disability from November 3, 1999, to March 21, 2000. *Id*. The administrative law judge denied claimant compensation after March 21, 2000, and found that employer was not obligated to identify suitable alternate employment after this date since claimant was terminated due to his own malfeasance.

We cannot affirm the denial of all compensation after claimant's termination on March 21, 2000. The termination has no effect on the administrative law judge's finding that claimant's job with employer was unsuitable for him. When claimant is terminated with cause from an unsuitable job, employer bears the renewed burden of establishing suitable alternate employment, in order to mitigate its liability for total disability benefits. *See Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this regard, the administrative law judge found that, after his termination, claimant performed work within his restrictions after he started Brothers and became self-employed. This finding of suitable alternate employment is unchallenged on appeal. Claimant, however, is entitled to compensation for any loss of wage-earning capacity due to his work injury after his termination on March 21, 2000, including total disability until claimant commenced the suitable alternate work. *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). Accordingly, we vacate the administrative law judge's denial of compensation after March 21, 2000, and we remand this case for the administrative law judge to determine claimant's entitlement to disability benefits after March 21, 2000.

On remand, the administrative law judge also should address claimant's contention that he is entitled to compensation for temporary total disability from September 14, 2000, when Dr. Jackson opined that claimant should stop working due to his neck condition. Claimant's testimony is that he did not follow Dr. Jackson's recommendation, but continued working in pain. Tr. at 88-89, 125. We therefore reject claimant's contention, based on Dr. Jackson's opinion, that he is *per se* entitled to compensation for temporary total disability from September 14, 2000. Medical evidence alone is not dispositive of claimant's entitlement to compensation after September 14, 2000, as disability is an economic determination based on a medical foundation. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Claimant, however, may be found totally disabled despite continued employment if he works only through extraordinary effort and in spite of excruciating pain. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999). Accordingly, on remand, the administrative law judge should address the evidence in this regard.

We next address the administrative law judge's denial of claimant's wrongful discharge claim. Section 49 of the Act prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act, and if the employee can show he is the victim of such discrimination, he is entitled to reinstatement and back wages. 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 [Geddes II]*, 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 circumstances of an employee's discharge may be examined to determine whether employer's reason for discharge is the actual motive or a mere pretext, and the administrative law judge may infer animus from the circumstances. *See, e.g., 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).

In this case, claimant and his co-manager in the paint department, Harry Verret, owned a labor subcontracting company, which provided laborers to various employers, including employer. The administrative law judge found that at some time prior to his termination in March 2000, employer informed claimant and Mr. Verret that they must change the manner in which their company provided contract labor. Specifically, the record shows that employer told claimant that kickbacks were prohibited and that their company must implement an invoice system to identify its employees hired by employer. Tr. at 204-205, 235-238, 246. The administrative law judge credited evidence that, subsequently, claimant demanded a kickback from Valentine Industrial Contractors for painting department employees it was providing employer. EX 30 at 13-17. This demand was reported to employer's human resource and safety director, and resulted in claimant's dismissal, as well as the dismissal of Mr. Verret. Tr. at 215-220, 226-227, 238-248. Based on this evidence, the administrative law judge found that claimant was terminated for violating employer's policy against dishonesty, and that claimant failed to establish that his firing was at all motivated by the filing of a compensation claim. The administrative law judge also reasoned that claimant's termination lacked temporal proximity to the filing of his claim, as a period of approximately 18 months separated the filing of the claim from his termination. The administrative law judge rejected claimant's allegation of discrimination based on employer re-hiring Mr. Verret. The administrative law judge credited evidence that Mr. Verret did not participate in requesting kickbacks from Valentine. Tr. at 206-207, 251-252. Finally, the administrative law judge found no other evidence that employer had retained employees who had demanded kickbacks from subcontractors. *See* CX 100. The administrative law judge concluded that there is no evidence that claimant was treated differently from other employees who had violated the

company policy prohibiting dishonesty. As substantial evidence supports the administrative law judge's finding that claimant failed to establish he was treated differently from other supervisory employees who violated employer's policy related to dishonesty, we affirm the administrative law judge's conclusion that claimant failed to establish that his termination was due to his filing a compensation claim, pursuant to Section 49. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

In its cross-appeal, employer contends the administrative law judge erred in awarding claimant compensation for facial disfigurement under Section 8(c)(20) of the Act, 33 U.S.C. §908(c)(20). Specifically, employer argues that claimant failed to raise this issue prior to the hearing, the administrative law judge relied on irrelevant evidence, and the administrative law judge failed to explain the basis by which he found that, "claimant suffered an impairment or blemish in the symmetry of his facial appearance." Decision and Order at 36.

Section 8(c)(20) of the Act provides:

> Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

Thus, benefits under this section may only be awarded for head, neck and face disfigurement if the disfigurement is "serious." *Schreck v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 611 (1978). Since claimant is claiming disfigurement to his face, he need not establish that the alleged disfigurement handicapped him in securing or maintaining employment. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). In his decision, the administrative law judge stated that "claimant suffered an impairment or blemish in the symmetry of his facial appearance." Decision and Order at 36. In this regard, the administrative law judge credited evidence that claimant's facial skin was denuded for re-growth, and that numerous debridement procedures were conducted to remove sand particles from his facial area. CX 10; Tr. 41-45. The administrative law judge credited claimant's testimony that future facial debridement will be required as sand particles continue to surface over time. Tr. at 44-45. The administrative law judge credited his personal observation of claimant and the photographs taken on the day of injury to conclude that claimant has a serious facial disfigurement. In determining the amount of claimant's disfigurement award, the administrative law judge reasoned that claimant will encounter continuing physical problems as sand particles surface with time, which will result in future medical treatment and medications. The administrative law

judge therefore awarded claimant $5,000 of the maximum amount of $7,500 that may be awarded under the Act for disfigurement.

Employer challenges the administrative law judge's reliance on photographs of claimant taken on the day of injury, CX 1, the administrative law judge's description of claimant's disfigurement as a "an impairment or blemish in the symmetry of his facial appearance," Decision and Order at 36, and the administrative law judge's crediting of claimant's testimony to find that future surgery on claimant's face will be necessary. Employer argues that the photographs taken on the day of injury bear no relationship to claimant's permanent facial condition for which he seeks compensation. Moreover, employer argues that the administrative law judge's reasoning supporting the award is insufficiently descriptive and inaccurate as there is no evidence that claimant's facial injury resulted in a loss of facial symmetry.

The administrative law judge acted within his discretion in crediting claimant's testimony as to his need for future surgery. The administrative law judge also may rationally rely on photographs taken on the day of the injury for purposes of showing that claimant sustained a work-related injury to his face, and his personal observation of claimant at the hearing to determine that claimant sustained serious facial disfigurement. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). Nonetheless, the administrative law judge's finding that claimant sustained an "impairment or blemish in the symmetry of his facial appearance," Decision and Order at 36, is insufficiently clear for the Board to affirm the administrative law judge's award of $5,000 for serious facial disfigurement. In this regard, employer argues that claimant's facial condition pre-existed the work injury, and it requests that the record be re-opened on remand for the submission of photographs taken of claimant before and after his work injury. Insofar as claimant did not request compensation for facial disfigurement until he submitted his post-hearing brief, on remand the administrative law judge shall afford employer the opportunity to submit this relevant rebuttal evidence.[2] *See* CX 6; Post-Hearing Brief at 16. The administrative law judge should fully explain the basis for his

[2] We reject employer's contention that the administrative law judge erred by awarding claimant compensation for disfigurement since claimant did not raise this issue prior to the hearing. Employer did not object while the case was before the administrative law judge to claimant's raising this issue in his post-hearing brief. *See also* Tr. at 39-41. Accordingly, employer may not now argue for the first time on appeal that claimant is precluded from raising his entitlement to compensation for disfigurement. *See generally Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

finding that claimant's disfigurement is "serious" in light of any evidence employer submits on remand.

Accordingly, the administrative law judge's disfigurement award and the denial of disability compensation after March 21, 2000, are vacated, and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge