BRB No. 05-0298

TRISHA MONTA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: 11/30/2005
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Self-Insured Employer/Third-Party Administrator-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

William N. Brooks, II, Long Beach, California, for employer/third-party administrator.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order on Motion for Reconsideration (2002-LHC-2960) of Administrative Law Judge Alexander Karst 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*., as extended by the Nonappropriated Funds Instrumentalities Act, 5 U.S.C. §8171 *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 for employer in the auto port beginning in 1999, first as a supervisor and then as a service writer. On February 21, 2002, she slipped and fell on a puddle of water in the restroom, landing on her right elbow and hip. She immediately felt pain in her mid and lower back, neck, and right hip, and sought treatment at the emergency room. She attempted to return to work, but found it too painful. She began treatment with Dr. Howard, an orthopedic surgeon, in 2003. Dr. Howard diagnosed acute lumbosacral myofascial strain. In addition, after reviewing an MRI, he concluded that claimant had mild disc dehydration and an annular tear at the L2-3 level and more significant disc dehydration and an annular tear at the L4-5 level. Dr. Howard, and claimant's family physician, Dr. Geiler, treated claimant conservatively with pain medication, epidural steroid injections, aquatic therapy and physical therapy. After these treatments did not work, Dr. Howard ordered a discography to determine the source of claimant's pain and to decide whether surgery would be needed. The discography was performed by Dr. Rosen, who recommended surgery at L4-5. On October 14, 2002, claimant and Dr. Howard discussed her options, and claimant decided that surgery would be prudent. However, employer refused to authorize the surgery after its reviewing doctor, Dr. Sturtz, concluded that surgery under the facts in this case would "constitute medical malpractice." Claimant returned to work on April 12, 2002, for one-and-a-half to two days of light duty in employer's administrative office performing data entry for the gas station and auto port. However, claimant was not able to continue in this position because she was experiencing too much pain. Claimant sought temporary total disability and medical benefits under the Act.

The administrative law judge initially bifurcated the issue of the necessity of spinal surgery from the compensation issues raised. In his first decision, the administrative law judge found that claimant is unable to perform her usual duties as a service writer. The administrative law judge also found that claimant was unable to perform the duties in the administrative office that were assigned as light duty on April 12, 2002. Therefore, the administrative law judge found claimant entitled to total disability benefits from May 2, 2002 until January 23, 2003, and ordered employer to pay

for all medical treatment, save the proposed surgery, for her back and neck injury. This decision was not appealed.

Claimant again attempted to perform data entry work for employer beginning in January 2003, but left in April 2003 due to pain. Prior to the hearings on the bifurcated issue of the necessity of spinal surgery, claimant was terminated on March 26, 2004, because she allegedly received unauthorized discounts while shopping at the Base Exchange in December 2003. Therefore, in addition to the necessity of the spinal fusion, in his second decision the administrative law judge addressed claimant's request for reinstatement as she contended she was terminated in violation of Section 49 of the Act, 33 U.S.C. §948a. With regard to the spinal surgery, the administrative law judge found that claimant was presented with two valid medical alternatives: continued conservative treatment or spinal fusion surgery. He concluded that claimant had tried the conservative treatment and reluctantly wants the surgery now, and that as the proposed surgery is a reasonable option for treatment of her work injury, it must be paid for by employer. The administrative law judge also found that employer has not established suitable alternate employment because claimant continued to experience debilitating pain which prevents her from working. Thus, the administrative law judge concluded that claimant is entitled to continuing temporary total disability benefits until she has recovered from her surgery and can be reassessed. Finally, the administrative law judge found that the discount episode at the Base Exchange was a pretextual reason for firing claimant and that claimant's supervisor was motivated by discriminatory animus due to her filing a compensation claim. Therefore, the administrative law judge concluded that claimant is entitled to reinstatement by employer. In an Order on Reconsideration, the administrative law judge ordered employer to pay for pain management and spinal surgery, if claimant chooses to pursue surgery after a trial of pain management. In addition, the administrative law judge found that the question of whether claimant is qualified to perform her former duties after reinstatement is premature because she has not reached maximum medical improvement. However, because she would be able to shop at the Base Exchange while on disability, he concluded that it is not premature to reinstate her to her employment.

On appeal, employer contends that the administrative law judge erred in finding that employer did not establish suitable alternate employment and therefore in awarding temporary total disability benefits. In addition, employer contends that the administrative law judge erred in finding that claimant has not reached maximum medical improvement and that the administrative law judge should have looked at whether claimant's condition is permanent and stationary without the spinal surgery. Employer also contends that the administrative law judge erred in finding that the recommended surgery is a reasonable alternative for the treatment of claimant's condition. Finally, employer contends that the administrative law judge erred in finding that claimant's termination was discriminatory, and that even if Section 49 applies, claimant cannot be reinstated because she cannot

perform the duties of her employment. Claimant responds, urging affirmance of the administrative law judge's decision in all respects. The Director, Office of Workers' Compensation Programs, (the Director) also responds, urging affirmance of the administrative law judge's findings that spinal fusion surgery is appropriate if claimant chooses to pursue this option and that reinstatement is an appropriate remedy if the Board affirms the administrative law judge's finding that employer violated Section 49. In addition, the Director urges the Board to remand the case to the district director for assessment of a monetary penalty if the Board affirms the administrative law judge's finding that claimant's discharge was in violation of Section 49. The Board heard oral argument in this case in San Francisco, California, on June 28, 2005.

Section 7

Initially, we address employer's contentions regarding the administrative law judge's finding that employer is liable for the proposed spinal fusion surgery. Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In order for medical care to be compensable, it must be appropriate for the injury, *see* 20 C.F.R. §702.402, and the administrative law judge has the authority to determine the reasonableness and necessity of a procedure refused by employer. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, held in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), that "when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT), citing 1 Larson, Larson's Worker's Compensation Law §13.22(e)(1998)("In general, if claimant gets conflicting instructions on treatment from different doctors, and chooses to follow his or her own doctor's advice, this is not unreasonable.")

The record in the instant case contains the opinions of three physicians regarding the merit of the proposed spinal surgery. Dr. Howard, claimant's treating physician, has treated claimant since March 28, 2002, when she was referred by her general practitioner for back and leg pain. After conservative treatment, Dr. Howard noted that claimant had experienced little relief. Following a discogram, from which Dr. Howard and Dr. Rosen diagnosed claimant with an annular tear at L4-5, Dr. Howard opined that claimant may be

afforded some relief from a spinal fusion operation.[1] The administrative law judge observed that Dr. Howard is a "Harvard-educated, board-certified orthopedic surgeon," and that 90 percent of his practice is devoted to spinal surgery. Dr. Sturtz, also a board-certified orthopedic surgeon, reviewed claimant's medical records on behalf of employer and concluded that claimant had sustained a minor strain to her low back, but that she had had sufficient time to recover. He stated that she could return to her former work with no restrictions. Moreover, he testified that it would be medical malpractice to perform the surgery proposed by Dr. Howard. Tr. at 250. Because of the discrepancy in the opinions of these two physicians, the parties agreed to have claimant examined by a third physician, Dr. Taylor, a board-certified neurosurgeon. Dr. Taylor reviewed claimant's medical records and diagnosed "chronic low back pain syndrome, possible chronic lumbar strain at L4-5, based on degenerative disc disease at that level" and "chronic cervical strain, left side." Cl. Ex. 2. Dr. Taylor stated that claimant had not reached maximum medical improvement as she needs further treatment for her ongoing pain complaints, as well as physical rehabilitation. While Dr. Taylor disagreed with Dr. Howard's recommendation for surgery, he stated that "Dr. Howard is not alone among spinal surgeons who would accept just this type of case for the surgery he proposes," Cl. Ex. 2, and opined that spinal fusion surgery would not constitute malpractice.

We reject employer's contention that the administrative law judge erred in finding that the recommended surgery was reasonable under the facts in this case based on his finding that the opinion of claimant's treating physician is entitled to greater weight. The Ninth Circuit held in *Amos* that the opinion of claimant's treating physician is entitled to special weight and that claimant is entitled to choose her course of treatment when presented with reasonable options.[2] Moreover, the administrative law judge recognized

[1] Specifically, Dr. Howard testified that claimant has an 80 percent chance of receiving 50-80 percent relief from her persistent pain symptoms with the spinal fusion surgery. Dr. Howard also offered claimant an alternative operation using a new disc that has yet to be approved by the United States Food & Drug Administration, but is expected to be available soon. Cl. Ex. 6 at 38.

[2] In the case cited by employer, *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), the Supreme Court held that the Employee Retirement Income Security Act, unlike the Social Security Act, does not require plan administrators to accord special deference to the opinions of treating physicians. *Nord*, 538 U.S. at 829-30. However, the Court did not proscribe a fact-finder from giving such deference, but rather stated that it was not appropriate to have a rule **requiring** such deference in the administration of a voluntary contractual plan. *Nord* thus does not overrule the holding in *Amos*. The court noted that some courts have approved of according treating physicians special deference under the Longshore Act and the Secretary of Labor has adopted a version of the rule for

claimant's reluctance to have surgery and her frustration that the conservative treatment has not provided any relief. The administrative law judge also found that Dr. Taylor stated that a reasonable physician could recommend the surgery as a viable option for treating claimant's condition. Lastly, the administrative law judge found that Dr. Howard specializes in spinal surgery and has a good reputation. Therefore, the administrative law judge concluded that the choice between the two valid options should be left to claimant, and that employer must pay for the surgery if that is her choice. *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT). We affirm this finding as it is rational, supported by the evidence of record, and consistent with applicable Ninth Circuit precedent. *Id.*

Extent of disability

Employer contends that the administrative law judge erred in finding that claimant is entitled to temporary total disability benefits, as she has been offered light-duty work with employer and it has introduced a labor market survey identifying suitable alternate employment. The parties do not dispute that claimant is incapable of returning to her former duties as a service writer. Therefore, in order to meet its burden of demonstrating suitable alternate employment, employer must demonstrate the availability of specific jobs which claimant is capable of performing given her physical restrictions and educational and vocational background. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). However, the offer of a job which is too physically demanding for the employee to perform or which entails unnecessary work does not constitute suitable alternate employment. *See Bumble Bee Seafoods*, 629 F.2d at 1330, 12 BRBS at 662; *Ezell*, 33 BRBS at 25.

In the present case, the administrative law judge reviewed the evidence regarding the light-duty work offered by employer and the positions in data entry identified in employer's labor market survey. He addressed claimant's testimony that she was unable to perform the light-duty work offered by employer due to constant pain, H. Tr. at 60, and her supervisor's testimony that claimant would sometimes need to leave work early due to pain and frequently complained of pain, H. Tr. at 187-188. The administrative law judge also noted that claimant contemporaneously told Dr. Howard that her pain was an 8 or 9 on a scale of 1 to 10. Cl. Ex. 7. The administrative law judge found that Dr. Howard and claimant denied that the light-duty position itself caused her additional pain, but

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benefit determinations under the Black Lung Benefits Act, 30 U.S.C. §901 *et seq*. *See* 20 C.F.R. §718.104(d)(5) (2002). *Nord*, 538 U.S. at 830.

opined that her pain made claimant unable to work. The administrative law judge also found that claimant's testimony was corroborated by her husband's testimony that she would often wake up at night due to the burning pain in her back and legs. The administrative law judge addressed the opinions of Drs.Taylor and Howard and of claimant that she could physically perform the data entry positions identified, Decision and Order at 7-8, but found that she was prevented from working due to her pain. The administrative law judge concluded that claimant would need to undergo pain management before she could work again.

Notwithstanding medical evidence and testimony that claimant is capable of some employment, the administrative law judge, as the finder-of-fact, rationally found that claimant is unable to perform any alternate work, based on her subjective complaints of pain. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge found that claimant's testimony is credible and corroborated by the other evidence of record. While the positions identified are within claimant's restrictions and claimant testified that the work itself does not cause increased pain, we affirm the administrative law judge's finding that claimant is not capable of any work at the present time due to the persistent burning pain she experiences, as this finding is rational and supported by substantial evidence. *See generally Lostaunau v. Campbell Industries Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Therefore, we affirm the award of total disability benefits.

Nature of disability

Employer contends that the administrative law judge erred in finding that the date of maximum medical improvement is "irrelevant." Decision and Order at 8. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). If surgery is anticipated, maximum medical improvement has not been reached. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Kuhn v. Associated Press*, 16 BRBS 46 (1983). If, however, surgery is not anticipated or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie*, 34 BRBS at

13; *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200(1986); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1982).

In the present case, Dr. Taylor opined that claimant needs further treatment and was not "permanent and stationary" as of April 2003. Dr. Howard reported in November 2003 that claimant is permanent and stationary, but later testified that he did this out of frustration because employer was not authorizing the recommended surgery or the pain management. Cl. Ex. 6 at 34. He testified in a deposition that he does not believe claimant will reach maximum medical improvement until she has had the surgery or been treated by pain management specialists. Cl. Ex. 6 at 98. The administrative law judge acknowledged these opinions, Decision and Order at 8 n.2, but found it was "irrelevant" whether claimant had reached maximum medical improvement and that she is entitled to temporary total disability benefits until she has recovered from her surgery and her functional capabilities can be assessed. Decision and Order at 8. The award of temporary total disability is supported by substantial evidence in view of the proposed surgery and the opinions of Drs. Taylor and Howard. *Kuhn*, 16 BRBS 46. Claimant is undergoing treatment with a view toward improvement. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). Therefore, we reject employer's contention of error, and we affirm the administrative law judge's award of temporary total disability benefits.

Section 49

Employer contends that the administrative law judge erred in finding that claimant's termination was discriminatory in violation of the Act. Section 49 of the Act, 33 U.S.C. §948a, provides that an employer may not discriminate against an employee who has either claimed or attempted to claim compensation under the Act from the employer. If it is demonstrated that the employer did in fact discriminate against the employee on this basis, the employer shall be liable for a penalty payable to the Special Fund and must reinstate the claimant to her employment. To establish a *prima facie* case of discrimination, a claimant must demonstrate that her 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); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988); *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. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). The essence of discrimination is treating the claimant in a disparate manner from other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). In this case, claimant was fired; therefore a

discriminatory act was committed. *See Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988).

With regard to "discriminatory animus," the administrative law judge found that the "discount episode" was a pretextual reason for firing claimant. The administrative law judge found that employer was motivated by discriminatory animus toward claimant because she had filed a compensation claim. In this regard, the administrative law judge credited claimant's testimony that the head of loss prevention began following her around when she shopped at the Exchange. Claimant's supervisor, Mr. Lupton, testified that claimant had complained to him about the harassment when she shopped. H. Tr. at 213. Specifically, claimant described an incident in early December 2003. The cashier was called by a supervisor and then reported to claimant that the supervisor "thinks you're trying to steal the soda." *Id.* at 44. Claimant also testified that a few days after the soda incident, Circuit City advertised a DVD player on sale for $29.99, but they were sold out when she went there. She took the advertisement to the Exchange in order to buy the DVD player at the matched price.[3] She told the cashier that she had the advertisement in the car if he needed to see it, but he stated that he did not need it. H. Tr. at 39. She also purchased a set of pots and pans at a discount under the same price matching program, and told the cashier that he would need to call the store to verify the price. She was told again that it was not necessary. *Id.* In January 2004, claimant was contacted by the Military Police; she contacted the Exchange and was told that the cashier had been fired. Claimant was interviewed by the Military Police on January 15, 2004, but she testified that she was not implicated in any wrongdoing; the cashier had told the police that claimant had asserted that there were advertising flyers available if he needed them. *See* H. Tr. at 220. On March 3, 2004, claimant was sent a letter from Mr. Lupton, informing her that the Exchange proposed to terminate her because she had received unauthorized discounts on December 21, 2003. Emp. Ex. 5. The letter claimed that claimant had knowledge of the requirements of the price-matching program due to her former position in the auto department. Claimant did not respond to this letter, and employer sent her a notice of termination on March 26, 2004.

The administrative law judge found that discriminatory animus may be inferred under these facts as Mr. Lupton's apparent assumption that claimant had a duty to question the cashier and to not accept the discount because he did not require her to produce the advertisement is not rational. The administrative law judge credited claimant's testimony that she had the advertisement in the car as she eventually gave it to

[3] The Exchange ran a "Nobody Beats Program," in which the Exchange matched the advertised sale price of its competitors. If the price difference was over $10.00, the cashier was required to obtain documentation of the competitor's sale price, *i.e.*, a copy of the advertisement, and the approval of a supervisor.

Mr. Lupton. The administrative law judge found that there is no evidence, or accusation, that claimant colluded or conspired with the cashier to steal. The administrative law judge concluded that claimant should have been treated as a customer, and that Mr. Lupton did not act in good faith for firing her under these circumstances. In addition, the administrative law judge rejected employer's contention that the cashier's firing is evidence of employer's even-handedness, as he was fired in January 2004 for reasons that are not disclosed in the record.

The administrative law judge also found that it was not reasonable for employer to treat claimant as an associate with full knowledge of the requirements for receiving a discount under the facts of this case. He noted that she had limited, if any, experience with the discount procedure while working as a service writer in the auto port and that, in any event, she had not worked in this position since February 2002. The administrative law judge also found that Mr. Lupton did not review the Navy Exchange manual cited in the letter, claimant's statement to the Military Police, or the cashier's statement, before he made the decision to terminate claimant. The administrative law judge also noted that Mr. Lupton testified that if the same incident had occurred between an associate and the wife of a petty officer, it would not have been considered theft.[4] H. Tr. at 240. The administrative law judge did not find Mr. Lupton's testimony regarding the reasons he fired claimant to be persuasive, and there is no documentary evidence in the record regarding the Exchange's policy or its enforcement. The administrative law judge also found it significant that the cashier was fired for reasons not disclosed in the record and that claimant's termination occurred two months later in March 2004. Thus, after reviewing the evidence, the administrative law judge concluded that the "discount episode with [the cashier] was a pretextual reason for firing [claimant]," and that employer had not established that it was not motivated, even in part, by claimant's exercise of her rights under the Act. Decision and Order at 11.

Section 49 is violated if the discharge was even partially motivated by animus against a claimant who files a compensation claim. *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978). In reaching the finding that claimant was

[4] Mr. Lupton, testified that claimant's termination was wholly unrelated to her workers' compensation claim and that any other employee who had not filed a claim would have been treated the same way. He testified that claimant's termination for receipt of an unauthorized discount is consistent with the Navy Exchange Policy Manual and that this is the usual remedy for allegations of unauthorized discounts and it is "looked upon as taking money from the sailor." H. Tr. at 204. Mr. Lupton also testified that although he had not encountered a situation of an unauthorized discount being given before, memoranda that he had received from headquarters described such episodes and in all instances the associates were terminated. *Id*. at 238.

discharged due to her claim for compensation, the administrative law judge properly examined the totality of the circumstances regarding claimant's discharge, including claimant's treatment at the Exchange following her injury, the details of the incident in December 2003, claimant's discharge two months after the termination of the other employee involved in the pricing incident, and the way employees and customers are treated under the Exchange's price-matching policy. The administrative law judge's finding is based on substantial evidence of record, including his observations of the witnesses and determinations regarding their credibility. As it is supported by substantial evidence, we must affirm this finding and that the administrative law judge rationally found discriminatory animus from the circumstances of claimant's termination. *See Dunn*, 33 BRBS at 206. Therefore, we affirm the administrative law judge's finding that employer's termination of claimant was in violation of Section 49 of the Act.

As we affirm the administrative law judge's finding that claimant was terminated in violation of Section 49 of the Act, we next address whether reinstatement is an appropriate remedy in this case. The administrative law judge found that reinstatement is appropriate because claimant retains the right to shop at the Exchange while she is still an employee. Moreover, the administrative law judge found that claimant should not be assessed to determine whether she can actually perform the duties of her former employment until after she has completed treatment for her work-related injury and reached maximum medical improvement. Employer contends that the clear and unambiguous language of Section 49 provides that an employee must be reinstated unless that employee shall cease to be qualified to perform the duties of her employment.[5] As it is undisputed that claimant cannot return to her former employment at this time, employer contends that reinstatement is inappropriate in the instant case. Employer observes that Section 49 does not contain language requiring that the assessment of an employee's capabilities be deferred until her condition has stabilized or reached permanency. The Director responds to employer's contention, urging affirmance of the administrative law judge's decision to reinstate until claimant can be assessed upon reaching maximum medical improvement. The Director contends that assessing an employee's ability to qualify to perform the duties of her employment immediately after

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[5] Section 49 of the Act provides in pertinent part that:

> Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

33 U.S.C. §948a.

an injury would make the remedy of reinstatement unavailable to most injured employees, even if they are found to have been discharged in violation of the statute. The implementing regulations are silent concerning when the assessment of claimant's ability to work is to be made. *See* 20 C.F.R. §§702.271-274.

The administrative law judge found that a meaningful assessment of claimant's ability to perform her duties could not be made until she reaches maximum medical improvement. He thus reinstated her to her employment until that assessment can be made. The Act and its regulations contain no specific guidance regarding the point at which claimant's ability to perform her former job should be assessed. The administrative law judge's decision on the facts presented that assessing claimant's capabilities should await a determination of permanency is reasonable. The United States Court of Appeals for the Ninth Circuit has generally given deference to the Director's position on issues involving the interpretation or application of the Act because the Director is charged with the administration of the Act. *See, e.g., General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *pet. for cert. pending*, No. 05-371 (Sept. 19, 2005); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991). We hold that the Director's interpretation of the statute as permitting the assessment of claimant's capabilities after she has reached maximum medical improvement is reasonable and consistent with the purpose of the Act. Therefore, we affirm the administrative law judge's finding.

Moreover, as we affirm the administrative law judge's finding that employer violated Section 49, the Director also urges the Board to remand the case to the district director for a determination of the amount of a monetary penalty, payable to the Special Fund, as required by that section. *See* 33 U.S.C. §948a; 20 C.F.R. §702.273. The monetary penalty is mandatory and was not addressed by the administrative law judge.[6] Thus, remand is warranted. However, Section 702.273, 20 C.F.R. §702.273, states that the administrative law judge is responsible for the final determinations on all disputed issues connected with the discrimination complaint, including the amount of penalty to be assessed. Therefore, we grant the Director's request, but as the case has previously progressed through informal proceedings before a district director, we remand the case to the administrative law judge for assessment of the monetary penalty.

Accordingly, the Decision and Order and Order on Motion for Reconsideration awarding medical and temporary total disability benefits are affirmed. In addition, the

[6] Section 702.271(a)(2) provides that any employer who violates this section *shall be* liable to a penalty of not less than $1,100 or more than $5,500 to be paid to the district director. 20 C.F.R. §702.271(a)(2)(emphasis added).

administrative law judge's finding that claimant was terminated in violation of Section 49 of the Act, and thus is entitled to reinstatement until she can be assessed to

determine whether she is able to perform her former employment after reaching maximum medical improvement, is affirmed. The case is remanded to the administrative law judge for assessment of a mandatory monetary penalty pursuant to Section 49 of the Act.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge