BRB Nos. 95-1090
and 95-1090A

EDWARD A. MANSHIP	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NORFOLK & WESTERN RAILWAY COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Berlin, Mark E. Martin and James D. Weiss (Sidley & Austin), Washington, D.C.; Joan F. Martin (Williams Kelly & Greer, P.C.), Norfolk, Virginia; William P. Stallsmith, Jr., and Mark D. Perreault, Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order, and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (93-LHC-2223) of Administrative Law Judge Fletcher E. Campbell, 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).[1] 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).

[1]Inasmuch as employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees was filed on October 18, 1995, the Board has determined that the one-year period referenced in Public Law No. 104-134 commences on that date for all the consolidated appeals.

During the course of his employment with employer, claimant allegedly injured his back on January 31, 1993, while pulling closed the door to a shanty. He was taken to the hospital where he was diagnosed with a lower back strain; claimant received an injection for his pain and was released with the restriction that he was not to return to his regular work until February 6, 1993. Prior to leaving the emergency room, claimant filled out employer's injury report. The next day, he was treated by employer's physician, Dr. Devereux, who diagnosed lumbosacral and sacroiliac strain with sciatica. Dr. Devereux authorized claimant to return to work on February 15, 1993.

On February 8, 1993, employer sent claimant a letter advising him that employer would be conducting an investigation regarding claimant's "alleged" injury and "false" statements about his back condition. Pursuant to the Railway Labor Act, 45 U.S.C. §153(i), and the collective bargaining agreement, an internal hearing was conducted by employer on February 24, 1993, presided over by T.A. Heilig, employer's Norfolk terminal superintendent. On February 26, 1993, employer filed a Notice of Controversion, asserting that it did not believe claimant's "alleged" injury took place at work. Claimant filed his claim for benefits under the Act on March 5, 1993. Three days later, on March 8, 1993, employer terminated claimant. This decision was appealed to the Public Law Board[2] pursuant to the Railway Labor Act. This Board denied claimant's appeal on August 26, 1994. In his pre-hearing statement to the administrative law judge, claimant alleged that employer violated the provisions of Section 49 of the Act, 33 U.S.C. §948a, by terminating him.

On the same day as his formal termination, March 8, 1993, claimant underwent a psychological evaluation by Dr. deSolminihac. Claimant complained that he feared losing his job, felt overwhelmed with stress, and had little outside support. Dr. deSolminihac diagnosed adjustment disorder with mixed emotional features. Thereafter, claimant moved to Vermont and began treatment with Dr. Gazda for his psychological problems. Dr. Gazda stated that claimant's adjustment disorder was a result of his January 31, 1993 work injury and his subsequent discharge; he believed claimant would be able to return to some form of employment as of the date of his last treatment, May 31, 1993, and that he would be able to return to his former employment with employer three months after that, on September 1, 1993.

[2]The Public Law Boards are three member arbitration panels consisting of a partisan member designated by each party and a third neutral member. *See* 45 U.S.C. §153.

In his Decision and Order, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption of causation with regard to claimant's back condition. The administrative law judge found rebuttal established based on the testimony of Yard Conductor John Moore, who testified that claimant had discussed a previous back condition with him on several occasions and that claimant was having back problems on the day of the injury. Considering the record as a whole, the administrative law judge then credited the testimony of claimant's co-worker Jeff Arkenau, who stated that claimant did not appear to have any back difficulties on January 31, 1993, prior to the incident. Thus, the administrative law judge found that claimant established a causal relationship between claimant's employment and his back condition and that claimant was entitled to temporary total disability benefits from February 1, 1993 through February 14, 1993.

With regard to claimant's psychological injury, the administrative law judge again invoked the Section 20(a) presumption, based on Dr. Gazda's opinion that claimant's emotional disorder was caused in part by the work-related injury. The administrative law judge rejected employer's contention that claimant's psychological disorder was caused by legitimate personnel actions - its investigation of claimant and the subsequent discharge - and was thus not compensable. The administrative law judge therefore found that claimant was entitled to additional temporary total disability benefits for his psychological injury from February 15, 1993 through September 1, 1993, the date Dr. Gazda returned claimant to his former employment. The administrative law judge further found that claimant was entitled to additional temporary total disability benefits from September 1, 1993 through November 14, 1993, the date he gained new employment, as employer failed to establish suitable alternate employment during this period. The administrative law judge then awarded temporary partial disability from November 15, 1993 through December 12, 1993. Lastly, the administrative law judge awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907. With regard to claimant's Section 49 allegation, the administrative law judge found that there was no evidence that employer was aware that claimant had filed a claim for benefits prior to the termination, or that claimant was treated differently than other employees, and thus, there was no evidence of discriminatory animus. The administrative law judge therefore rejected claimant's contention that employer violated Section 49 of the Act.

In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $11,987.70, representing 106.02 hours of legal services at co-counsel's hourly rates of $150 and $135 respectively.

On appeal, claimant contends that the administrative law judge erred in finding that employer's termination did not violate Section 49 of the Act. BRB No. 95-1090. Specifically, claimant asserts that the administrative law judge's earlier findings - that employer was predisposed to determine that claimant had falsified his injury, that claimant did not receive a fair or impartial hearing from employer, and that the termination was not a legitimate personnel action - all support a finding of discrimination, and are thus a violation of Section 49. Moreover, claimant argues that the injury report he filled out for employer on January 31, 1993, and the emergency room discharge report each constitute a claim under the Act. Therefore, claimant contends, the administrative law judge's finding that employer was not aware that a claim had been filed prior to claimant's

termination was in error. Employer responds, urging affirmance of the administrative law judge's denial of claimant's Section 49 claim. Specifically, employer argues that claimant's disciplinary proceedings and discharge were handled in accordance with the collective bargaining agreement and the Railway Labor Act.

Employer cross-appeals the administrative law judge's decision, contending that the administrative law judge erred in finding a causal relationship with regard to both claimant's physical and psychological injuries. BRB No. 95-1090A. Specifically, employer asserts that claimant's psychological injury occurred as a result of legitimate personnel actions, and thus is not compensable. Alternatively, employer argues that even if the psychological injury is compensable, it had no duty to establish suitable alternate employment after claimant was discharged. Employer further argues that claimant's back problems were not caused by any accident at work, but are the result of prior back problems. Claimant responds, urging affirmance of the administrative law judge's causation and disability findings. Employer also appeals the administrative law judge's award of an attorney's fee to claimant's counsel. Employer makes no specific challenges to the fee award, but rather asserts that since the Board is sure to reverse the administrative law judge's disability awards, claimant's counsel will not be entitled to a fee.

We first address claimant's contention raised in his appeal that the administrative law judge erred in finding that employer did not violate Section 49 of the Act when it terminated him on March 8, 1993. Section 49 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. 33 U.S.C. §948a (1988). 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).

Initially, we reject claimant's contention that the injury report he filled out at the emergency room on January 31, 1993, and the emergency room discharge report constitute claims under the Act, as neither report was ever filed with the district director. *See Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). In the instant case, employer, in accordance with the Railway Labor Act and the collective bargaining agreement, conducted an investigation of claimant subsequent to his injury to determine whether he falsely alleged a work-related injury. Based on a hearing conducted on February 24, 1993, employer discharged claimant on March 8, 1993. Pursuant to the Railway Labor Act, this decision was appealed to the Public Law Board, which affirmed the termination on August 26, 1994. While the administrative law judge found that

employer's disciplinary proceeding was not impartial, he ultimately found that claimant was treated no differently than other employees subject to disciplinary proceedings. In so finding, the administrative law judge relied on the testimony of claimant and Mr. Arkenau. When asked whether his disciplinary hearing was conducted in a different way from employer's other formal investigations, claimant stated that "it was conducted very much consistent with their usual method of operation for that procedure." Tr. at 93. Mr. Arkenau represented claimant at employer's disciplinary proceeding. Based on his prior experience as a representative at these proceedings, Mr. Arkenau prepared claimant to "expect the worst." Tr. at 160-161. Since substantial evidence supports the administrative law judge's finding that claimant was treated no worse than other employees subject to disciplinary proceedings, we affirm the administrative law judge's finding that claimant failed to establish discriminatory animus under Section 49. *See, e.g., Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). Accordingly, the administrative law judge's finding that employer did not violate Section 49 of the Act when it terminated claimant is affirmed.

We now address employer's contentions raised in its appeal. Employer asserts that the administrative law judge erred in finding that claimant suffered both a work-related back injury and a work-related psychological injury. We disagree. Where claimant establishes a *prima facie* case, claimant is entitled to the presumption at 33 U.S.C. §920(a) that his injury or harm arose out of and in the course of his employment. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

With regard to claimant's back condition, the administrative law judge invoked the Section 20(a) presumption based on claimant's complaints of back pain and the medical records, *see* Cl. Ex. 4, finding that claimant could have injured his back while closing the shanty door. The administrative law judge found rebuttal of the Section 20(a) presumption established based on the testimony of Yard Conductor Moore, who testified that claimant was having back difficulties on the day of the injury. However, the administrative law judge then credited the testimony of claimant's co-worker Jeff Arkenau, that claimant did not appear to have back problems before the incident with the door, over that of Mr. Moore; considering the record as a whole, the administrative law judge then found that claimant suffered a work-related back injury on January 31, 1993. While the testimony of Mr. Moore fails to sever the causal connection between claimant's injury and his employment, *see Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89

(CRT)(4th Cir. 1994), we hold that any error the administrative law judge may have committed in this regard is harmless as employer failed to establish that the administrative law judge's crediting of Mr. Arkenau is irrational. Accordingly, we affirm the administrative law judge's finding that claimant suffered a work-related back injury.

With regard to claimant's psychological injury, the administrative law judge based his invocation of the Section 20(a) presumption on the opinion of Dr. Gazda, who stated that claimant's adjustment disorder was caused, in part, by the January 31, 1993 work-related injury. *See* Gazda Dep. at 14-17; Cl. Ex. 14. The administrative law judge rejected employer's contention on rebuttal that employer's discharge of claimant was the sole cause of claimant's psychological problem, and thus found that claimant suffered a work-related psychological injury. In fact, there is no medical evidence in the record suggesting that claimant's emotional disorder is not related to his back injury. Accordingly, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption, and that claimant's psychological injury is work-related. *See, e.g., Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

Lastly, employer argues alternatively that if it is held liable for claimant's psychological injury, it should not be liable for compensation subsequent to September 1, 1993. We disagree. Relying on Dr. Gazda's testimony that claimant would have been psychologically able to return to his former employment on September 1, 1993, *see* Gazda Dep. at 22-23, the administrative law judge found that claimant was able to return to his usual work on that date. Decision and Order at 13 n.4. Nevertheless, the administrative law judge found that employer's termination of claimant was not a "legitimate personnel action" and that claimant was not discharged for reasons unrelated to his disability, actions which could absolve employer from further liability for total disability benefits. *See, e.g., 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); *Marino v. Navy Exchange*, 20 BRBS 166 (1988). Specifically, the administrative law judge found that the letter employer sent to claimant on February 8, 1993, showed that it was predisposed to find

that claimant had falsified his injury.[3] After reviewing the transcript of employer's formal investigation, the administrative law judge determined that Mr. Heilig was unable to act as both an impartial hearing officer *and* employer's representative. The administrative law judge concluded that the tenor of the hearing was prejudicial to claimant and that claimant did not receive a fair and impartial hearing, and therefore any decision reached by that process is tainted and cannot be considered legitimate. Thus, the administrative law judge concluded that the termination of claimant's usual job was not due to his misfeasance, but was a result of claimant's injury, and the administrative law judge shifted the burden of proof to employer to establish suitable alternate employment. As employer failed to demonstrate the availability of suitable alternate employment, the administrative law judge found that claimant was entitled to additional temporary total disability compensation from September 1, 1993 through November 14, 1993, and to temporary partial disability benefits for a defined period thereafter when claimant obtained alternate work on his own.

In arguing that the administrative law judge erred in awarding disability benefits subsequent to September 1, 1993, employer's reliance on *Brooks* is inapposite. In *Brooks*, claimant falsified his employment application and a pre-employment medical history. This fact was discovered after he suffered an injury at work. The claimant had returned to work for employer in light duty status, with no loss in actual wages, when he was terminated for falsifying his application in violation of a company rule. Claimant sought total disability compensation after his discharge, which an administrative law judge awarded. The Board reversed, however, holding that as claimant's discharge was for reasons unrelated to his disability, employer was not required to show different suitable alternate employment outside its facility. *Brooks*, 26 BRBS at 6. The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *Brooks*, based on the Board's reasoning. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993).

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[3] The letter stated, *inter alia*, that employer was conducting "a formal investigation to determine your responsibility, if any, in connection with your:

> 1)Falsifying an injury which you allege occurred at approximately 1:20 p.m., January 31, 1993, while working as brakeman, stationed at the knuckle check station south side, job assignment NL11, reporting at 7:00 a.m., January 31, 1993, and
>
> 2)Conduct unbecoming an employee in that you made false statements to officers of the company concerning matters under investigation, as it relates to the above alleged injury."

Cl. Ex. 16.

The administrative law judge, however, rationally distinguished *Brooks* from the instant case. The administrative law judge found that claimant's termination was based on the fact that employer determined, through the Railway Labor Act proceedings, that he falsified the existence of the work-related back injury itself. The administrative law judge found that this discharge was not legitimate.[4] This termination, thus, is integrally related to the work injury, as opposed to the situation in *Brooks* where the *prior* misconduct was merely *discovered* because of the work-related injury. Thus, it cannot be said that, as in *Brooks*, the termination of claimant's employment is due to his misfeasance, and the administrative law judge's determination to this effect is rational and supported by substantial evidence. *See also McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45 (CRT)(D.C. Cir. 1988), (burden shifts to employer to establish suitable alternate employment if usual job is not available when claimant is medically capable of performing it). Accordingly, the administrative law judge's awards of temporary total disability and temporary partial disability compensation subsequent to September 1, 1993, are affirmed.

In this regard, we note that claimant filed a motion requesting that the Board issue an Errata order of the administrative law judge's Decision and Order. In an Order dated March 28, 1996, the Board denied claimant's request, but accepted claimant's motion as a supplemental brief in support of his appeal. In this brief, claimant contends that the administrative law judge, while finding employer liable for temporary total disability compensation from September 1, 1993 through November 14, 1993 in the "Discussion" portion of his Decision and Order, failed to enter an order to this effect in the "Order" portion of the decision. Further, claimant points out that while the administrative law judge accepted the parties' stipulation that the compensation rate for claimant's temporary total disability is $411.19, *see* Decision and Order at 3, he entered an award at a compensation rate of $274.13. *See* Decision and Order at 17. Lastly, claimant argues that his temporary partial disability award should have been based on a compensation rate of $339.19, not $303.19. In response, employer argues that claimant limited his appeal to the Section 49 issue, and thus failed to timely raise this issue by failing to appeal any aspect of the compensation award. Employer further argues that claimant failed to timely raise this issue on reconsideration before the administrative law judge.

Employer's arguments are rejected. Claimant did attempt to seek reconsideration before the administrative law judge, which was denied as the administrative law judge found that the Board had jurisdiction of the case. Furthermore, claimant's appeal of the administrative law judge's decision is properly before the Board, and the parties are not bound by technical rules of pleading and procedures. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105, 107 n.2 (1995). Moreover, claimant is correct in asserting that the administrative law judge awarded claimant temporary total disability from February 1, 1993 through November 14, 1993 in the "Discussion" part of his decision but failed to enter this award on the "Order" page. In addition, the administrative law judge should have based his temporary total disability award on the stipulated compensation rate of $411.19, and he incorrectly applied the $411.19 figure to compute claimant's temporary partial disability award.

[4]The administrative law judge had the discretion to review the Railway Labor Act proceedings, as they were admitted into evidence and as the existence of a work-related injury was presented to the administrative law judge for resolution.

Accordingly, the administrative law judge's temporary total disability award is modified to reflect the parties' stipulated compensation rate of $411.19, and the temporary partial disability award is modified to reflect a compensation rate of $339.19. In all other respects, the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge are affirmed.[5]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]Inasmuch as we affirm the administrative law judge's finding of compensation liability for claimant's physical and psychological injuries, and employer makes no specific challenges to the administrative law judge's award of an attorney's fee, the administrative law judge's award of an attorney's fee to claimant's counsel is affirmed.