BRB Nos. 09-0733
and 10-0321

MICHAEL J. GOINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAKE CHARLES STEVEDORES, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	DATE ISSUED: 06/25/2010
	)	
Employer/Carrier-Respondents	)	
	)	
J.J. FLANAGAN STEVEDORES	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Order Granting and Denying in Part Employers Motions for Summary Judgment, Order Denying Claimant's Motion for Reconsideration, and Decision and Order Denying Section 48(a) of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Michael J. Goins, Glenmora, Louisiana, *pro se*.

Alan G. Brackett, Robert N. Popich and Beth S. Bernstein (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Lake Charles Stevedores, Incorporated and PORTS Insurance Company.

La-Sean M. Caselberry (Henslee Schwartz LLP), Houston, Texas, for J.J. Flanagan Stevedores and Signal Mutual Indemnity Association, Limited.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Order Granting and Denying in Part Employers Motions for Summary Judgment, the Order Denying Claimant's Motion for Reconsideration, and the Decision and Order Denying Section 48(a) (2008-LHC-1981, and 1892) of Administrative Law Judge Clement J. Kennington rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

Claimant filed claims seeking benefits for injuries sustained as a result of four separate accidents in the course of his work as a longshoreman; three while he was employed by Lake Charles Stevedores, Incorporated (LCS), *i.e.*, on January 17, 2001, August 14, 2001, and April 25, 2005, and a fourth while he was employed by J.J. Flanagan Stevedores (JJF), *i.e.*, on July 6, 2004. With regard to these claims, the administrative law judge found claimant entitled to temporary total disability benefits for the periods of January 17 through February 28, 2001, August 14, 2001 through December 10, 2002, July 6 through September 21, 2004, and April 25, 2005 through July 5, 2006. The Board affirmed the administrative law judge's award of benefits, but vacated his finding that claimant's entitlement to benefits for the April 25, 2005, injury, ceased as of July 5, 2006. *M.G. [Goins] v. Lake Charles Stevedores, Inc.*, BRB Nos. 07-0891, 08-0803 (Aug. 14, 2009) (unpub.) *recon. denied* (Nov. 9, 2009) (unpub. Order). The case was remanded for further consideration of this, as well as for several other issues.[1]

[1] The Board also reversed the administrative law judge's finding that claimant's psychological condition is not work-related, and vacated his suspension of payments for all disability compensation due claimant. *M.G. [Goins] v. Lake Charles Stevedores, Inc.*, BRB Nos. 07-0891, 08-0803 (Aug. 14, 2009) (unpub.), *recon. denied* (Nov. 9, 2009) (unpub. Order). The administrative law judge was instructed, on remand, to consider whether claimant is entitled to disability benefits after July 5, 2006, as a result of his physical disability following his April 25, 2005, accident and/or psychological condition, and if so, that he must then address the potential suspension of benefits as a result of

Meanwhile, claimant alleged that both LCS and JJF committed violations under Sections 31(c) and 49 of the Act, 33 U.S.C. §§931(c), 948a. Those claims were transferred to the Office of Administrative Law Judges. In response, both employers filed motions for summary decision asserting that there is no evidence to support claimant's claims that the employers committed fraud or discrimination against claimant due to his filing of claims under the Act. The administrative law judge ordered claimant to show cause as to why employers' motions should not be granted, *see* Orders dated January 13, February 10, and February 19, 2009, and claimant filed a response on or about January 20, 2009.

In his Order dated March 11, 2009, the administrative law judge found no evidence of any fraud or material misrepresentation by either employer and thus, no basis for finding any violation under Section 31(c). Consequently, he granted employers' motions for summary decision regarding the Section 31(c) allegations and, accordingly, denied claimant's claims "as unsupported and lacking in merit." The administrative law judge next dismissed the Section 49 claim against LCS since claimant did not show either the required discriminatory act or animus. The administrative law judge found, however, that claimant showed a termination and subsequent refusal to hire him by JJF as of March 12, 2005, which possibly could be due to claimant's filings of claims under the Act. He thus denied JJF's motion for summary decision, and a hearing was held on this claim on April 27, 2009.

In his decision dated January 14, 2010, the administrative law judge concluded, after review of claimant's allegations in conjunction with the record, that claimant did not present any evidence that JJF discriminated against him, or that there was any animus on the part of JJF and its representatives in the disciplinary actions taken against claimant in this case. Accordingly, the administrative law judge denied claimant's Section 49 claim against JJF.

Claimant, without assistance of counsel, appeals the administrative law judge's Orders dated March 11, 2009, and June 5, 2009, BRB No. 09-0733, and Decision and Order dated January 14, 2010, BRB No. 10-0321. LCS and JJF have filed response briefs, urging affirmance of the administrative law judge's denials of claimant's Section 31(c) and Section 49 claims.

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claimant's refusal to be examined by Dr. Perry, pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4). Claimant's appeal of the Board's decision to the United States Court of Appeals for the Fifth Circuit was dismissed for lack of jurisdiction. *Lake Charles Stevedores, Inc. v. Goins*, No. 09-60747 (5th Cir. Mar. 23, 2010).

Order Granting and Denying in Part Employers Motions for Summary Judgment

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); 29 C.F.R. §§18.40(c), (d), 18.41(a). In order to defeat the motions for summary decision in this case, claimant had to provide sufficient evidence for the administrative law judge to conclude that the employees could have committed violations under Sections 31(c) and 49 of the Act. *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003).

Section 31(c) of the Act provides:

> A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to section 909 of this title if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. §931(c); *see Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 21 BRBS 1(CRT) (5th Cir. 1988); *see also* 33 U.S.C. §931(a)(2). In this case, the administrative law judge issued three orders for claimant to show cause as to why employers' motions for summary decision should not be granted, explicitly instructing claimant that he "must provide [the administrative law judge] with evidence showing violations by employers of Section 31(c) and/or 48(a) of the Act." *See* Orders dated January 13, 2009, February 10, and 19, 2009. The record contains evidence of a response by claimant, dated January 20, 2009, consisting of letters outlining his position that LCS intentionally miscalculated his average weekly wage in an effort to reduce claimant's benefits and that JJF intentionally misrepresented and/or omitted relevant documents, wage records,[2] and evidence of

[2] Claimant submitted the wage records as "proof" of his actual earnings during several periods of time, that he was "a 5 to 6 day worker," and that he "worked under extreme pressure and hostile treatments by the employers and union because of union rights," and because of his filing of claims under the Act. *See* Claimant's submission dated January 20, 2009.

claimant's March 12, 2005, termination. Claimant also asserted that employers misrepresented his medical condition to employers' physicians. While claimant asserted that JJF and LCS committed numerous violations in terms of the provisions at Section 31(c), the administrative law judge found no evidence that would, if credited, suffice to establish that intentional false statements or misrepresentations were made by or on behalf of either LCS or JJF and/or their carriers for the purpose of reducing, denying or terminating benefits.

We affirm the administrative law judge's grant of summary decision on the Section 31(c) claims. In this regard, while claimant's wage records document his earnings during certain specific time periods, the administrative law judge properly found they do not provide any indicia of an intentional false statement or representation made by either employer. Moreover, the administrative law judge rationally found that claimant did not put forth sufficient evidence that either employer intentionally withheld any relevant documents or misrepresented claimant's medical condition in an effort to deny claimant's claim. As the administrative law judge properly found that claimant did not raise any genuine issues of material fact with regard to his Section 31(c) claims, we affirm the administrative law judge's decision to grant employers' motions for summary decision on this issue and thus, to dismiss claimant's Section 31(c) claims against employers. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 321-323 (1986); *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698 (5th Cir. 1994); *Little v. Liquid Air Corp*., 37 F.3d 1069 (5th Cir. 1994) (*en banc*).

In addition, we note that in its prior decision the Board fully considered claimant's contentions regarding his average weekly wage. The Board affirmed the administrative law judge's average weekly wage determinations, reached pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), for each of claimant's four injuries, as the results "are reasonable and supported by substantial evidence." *Goins*, Aug. 14, 2009, slip op. at 8. In particular, the Board noted claimant's assertion that "his actual hours did not accurately reflect his availability to work," but concluded that the administrative law judge "reasonably rejected claimant's requests to have these hours included in his average weekly wage." *Id.* at 8 n. 10. This decision constitutes the "law of the case." *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).[3]

[3] The "law of the case" doctrine holds that the Board will not reconsider issues previously decided in its prior consideration of the case, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Boone v. Newport News Shipbuilding & Dry*

Section 49 Claim Against LCS

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. To prevail on a claim filed pursuant to Section 49, a claimant must initially 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); *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 essence of discrimination is treating the claimant in a disparate manner from other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). Once these threshold elements are established, employer may defeat the claim by demonstrating that its action 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); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

The administrative law judge dismissed the Section 49 claim against LCS because claimant failed "to show either the required discriminatory act or animus." Order at 5. The administrative law judge's finding in this regard is affirmed as it is rational, supported by substantial evidence and is in accordance with law. As the administrative law judge found, there is no evidence to indicate that LCS committed any discriminatory act against claimant. In this regard, the record shows that claimant was involved in three separate accidents while working for LCS, that claimant returned to work for LCS following each of the first two incidents, and that claimant alleged, following the third incident with LCS, that he was incapable of performing any work due to his injuries and not due to any action by LCS. We, therefore, affirm the administrative law judge's decision to grant LCS's motion for summary decision, and thus, affirm his dismissal of claimant's Section 49 claim against LCS. *See generally G.M. [Meeker] v. P & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009). Consequently, the administrative law judge's Orders dated March 11, 2009, and June 5, 2009, are affirmed.

Dock Co., 37 BRBS 1 (2003); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

Section 49 Claim Against JJF

The administrative law judge noted claimant's two allegations of discrimination by JJF: 1) that employer permanently suspended or terminated claimant on March 12, 2005, because of his filing of work-related injury claims under the Act; and 2) that employer refused to assign claimant to longshore gangs or give him lighter, key jobs when such gangs traveled to ports outside of Lake Charles, Louisiana, in accordance with his length of service or seniority through ILA Local 2047's hiring hall in Lake Charles. With regard to the first allegation, the administrative law judge found that claimant was permanently suspended on March 12, 2005, because he cursed at and threatened a co-worker, Van Ned, and supervisor, Manuel Salinas, rather than because he filed a claim for compensation under the Act. The administrative law judge's finding is supported by the record.

In this regard, Mr. Salinas testified that claimant was terminated because of the March 12, 2005, incident as well as two other prior incidents where claimant threatened other foremen.[4] HT II at 118-120. This testimony is corroborated by the police report of that incident,[5] the general testimony of Mr. Flanagan, *id.* at 162, and the results of the grievance process. EX 4. Additionally, Mr. Salinas's account of the events which occurred on March 12, 2005, is consistent with claimant's testimony regarding that day; claimant also testified that he could not remember everything that happened on the day of the incident. HT at 84, 86; HT II at 31, 43-47. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's permanent suspension from JJF was due to his personal conduct and actions towards a supervisor and co-worker while at work on March 12, 2005, and thus, not related to his filing of claims under the

[4] Mr. Salinas's written report of the incident indicates that he was involved in a verbal altercation with claimant at which time claimant made derogatory remarks about Mr. Salinas and his family and seemed agitated to the point of threatening him. EX 3.

[5] The police report filed with regard to the March 12, 2005, incident, conveys Mr. Salinas's account of what happened and adds that a third party, Mr. Pentecost, "simply reiterated and confirmed what Salinas" had reported. EX 3. The report also indicates that both Mr. Salinas and Mr. Ned stated that claimant's "animated behavior" towards them "lent a perception of physical hostility to the encounter," which is further supported by the officer's statement that when he approached claimant at the time of the incident claimant "was very agitated." EX 4.

Act.[6] Consequently, we affirm the administrative law judge's conclusion that JJF did not violate Section 49 by permanently suspending claimant. *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988); *see generally Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

As for the second allegation, that claimant was discriminated against in the hiring of traveling gangs, the administrative law judge found that claimant presented no evidence to support his position that JJF committed any discriminatory act. Specifically, the administrative law judge found that the credible testimony of JJF's witnesses establishes that JJF's past practice was to allow foremen to assemble traveling gangs based on their knowledge of longshore work and that seniority was not a factor in the selection process. The administrative law judge thus found that, contrary to claimant's position, claimant was not denied work with the traveling gangs because he had filed claims under the Act. The administrative law judge found that instead, claimant merely had to wait his turn for such job assignments. Consequently, the administrative law judge found that JJF did not commit any discriminatory act in the formation of traveling gangs.

Claimant called Mr. Lubin and Mr. Powell as witnesses to support his traveling gang discrimination claim. However, both witnesses testified that the traveling gangs did not hire by seniority, HT II at 72, 98-99, and Mr. Lubin further stated that he has been subjected to the same problem as claimant with regard to the hiring of traveling gangs. *Id.* at 77-78. Mr. Salinas stated that the foremen are charged with making up the composition of the travel gangs and that each foreman "just calls people he knows that work in the industry," and that "they have no seniority they just come in as workers." *Id.* at 123-124. This testimony supports the administrative law judge's finding that claimant was treated like his co-workers with regard to the hiring of the traveling gangs and that he was not denied a travel gang assignment because he filed a claim under the Act. *See generally Holliman*, 852 F.2d at 761, 21 BRBS at 128-129(CRT); *Manship*, 30 BRBS 175; *Jaros*, 21 BRBS 26. We therefore affirm the administrative law judge's finding that JJF did not violate Section 49 of the Act.

[6] The administrative law judge's finding that "there is no direct evidence to show that Salinas was remotely aware of claimant's previous claims under the Act," Decision at 10, is supported by Mr. Salinas's statement that he had no knowledge of claimant's claims at the time of the March 12, 2005, incident, HT II at 122, 124, and Mr. Flanagan's testimony that superintendents, like Mr. Salinas, are neither involved with nor would they be aware of how longshore claims filed against JJF are resolved. *Id.* at 169-170. Thus, as the administrative law judge found, there is no element of animus on the part of JJF and its representatives in the termination of claimant.

Lastly, we reject claimant's argument that the administrative law judge failed to consider all of the relevant "data and elements of discrimination" in this case. At the hearing on April 27, 2009, extensive consideration was given to claimant's submission of exhibits, HT at 13-70, 99, resulting in claimant's submission of seven exhibits,[7] consisting of documents relating to the incidents resulting in his termination by JJF on March 12, 2005, and the subsequent actions taken by the district director with respect to claimant's claim. *See* CXs 1-7. Claimant also indicated that he had other documents to offer, to which employers objected. HT at 70. The administrative law judge instructed claimant that these exhibits were beyond the scope of the issue that was presently before him, *i.e.*, "dealing with your discharge in March," and JJF's "refusal" to subsequently rehire claimant. *Id.* at 71-72. At that point, claimant stated "I'm all right with that. Let's move right along." *Id.* at 72.

At the August 31, 2009, continuation of the hearing, claimant sought to submit additional evidence of payroll records and requested that the administrative law judge issue a subpoena for JJF to deliver payroll timesheets of its traveling gangs and all of its employees over the past ten years. HT II at 186. The administrative law judge denied this request, stating that "the record is what I have before me." *Id.* He nonetheless added, following further discussion regarding claimant's request that JJF be ordered to submit additional payroll records, *id.* at 189-199, that he would "review the record and I'll see if there's any need to have those records." *Id.* at 199, 201, 202.

In his decision, the administrative law judge acknowledged claimant's request that JJF be ordered to produce additional payroll records to assist claimant in establishing that he was discriminated against in the hiring of traveling gangs, but found that such a request is "irrelevant" to the discrimination claim. Decision and Order at 2. Moreover, the administrative law judge rejected claimant's assertion that he was denied a fair hearing as a result of his inability to call several witnesses to support his claim that he was denied fair treatment by JJF, because claimant "fails to point out that he paid none of these subpoenaed witnesses for their attendance and he had no proof of service of said individuals." *Id.* at 3.

Review of the hearing transcript reveals that the administrative law judge made every effort to assist and accommodate claimant in the presentation of his case. The administrative law judge rationally concluded that the wages of travel gang members are

[7] Although officially listed as claimant's exhibits 1 through 7, the record reflects that claimant submitted, in essence, 13 exhibits. In this regard, he offered, and the administrative law judge accepted, exhibits 4(a), (b) and (c), as well as exhibits 5, 5(a), 5(b), 5(c), and 5(d). *See* HT at 35-39, 60-67, 99.

not relevant to whether JJF refused to hire claimant for a traveling gang because he had filed a claim under the Act. There is no support for claimant's general allegations that he was unable to fully explore all issues relevant to his claims, or that claimant was deprived of a fair hearing in this case. Therefore, we reject his contentions that his due process rights were violated and that the administrative law judge exhibited bias against him. 29 C.F.R. §18.29(a); *see also* 5 U.S.C. §556; 33 U.S.C. §§923, 927; 20 C.F.R. §702.331 *et seq*.; *see generally United States v. Hays*, 515 U.S. 737 (1995) (a blanket complaint is insufficient to establish a denial of due process).

Accordingly, the administrative law judge's Order Granting and Denying in Part Employers Motions for Summary Judgment, Order Denying Claimant's Motion for Reconsideration, and Decision and Order Denying Section 48(a) are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge