

BRB No. 02-0609

AARON NORDHOLM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LASKEY-CLIFTON CORPORATION	)	DATE ISSUED <u>May 16, 2003</u>
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Damages for Violation of Section 48(A) (sic) of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Christine M. Meadows (Jordan Schrader, PC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Damages for Violation of Section 48(A) (sic) (01-LHC-1261) of Administrative Law Judge Anne Beytin Torkington 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 began working for employer as a laborer/oiler on September 20, 1999. On September 27, 1999, claimant fell at work and sustained facial lacerations. Thereafter, claimant was involved in several incidents in which employer's managers believed claimant acted in an unsafe manner. On December 2, 1999, claimant sustained injuries from a battery explosion; he received medical treatment, and was prepared to return to light duty work two days later when the site was shut down due to inclement weather. On December 15, 1999, when claimant called about returning to work, employer terminated claimant. Employer's project manager, Tom Wright, informed claimant that he was accident-prone and that the crane he was assigned to maintain and oil was found excessively low on oil. Claimant filed a compensation claim with employer for the December 2, 1999, injury, which employer received on December 27, 1999. Claimant was released to full duty work on May 1, 2000, and subsequently obtained other employment. Employer voluntarily paid claimant temporary total disability benefits from December 2, 1999 through April 30, 2002. Claimant subsequently filed a claim alleging that employer violated Section 49 of the Act, 33 U.S.C. §948a, because employer terminated him, in part, in anticipation of his filing a claim for the December 2, 1999, work injury.

In her decision, the administrative law judge found that claimant's discharge was not in violation of Section 49 of the Act. The administrative law judge credited evidence of seven work incidents involving claimant to find that employer terminated claimant because he was an unsafe worker who was a danger to himself and others, and she concluded that employer did not fire claimant due to his filing a claim for his work injury.

On appeal, claimant argues the administrative law judge erred in concluding that employer's motivation for terminating claimant was not due, in part, to his claiming compensation for his work injuries. Employer responds, urging affirmance.

Section 49 prohibits an employer from discharging or discriminating against an employee because he has claimed or attempted to claim compensation 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. 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) (4<sup>th</sup> 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) (4<sup>th</sup> Cir. 1993). The administrative law judge may infer animus from circumstances demonstrated by the record. See *Brooks*, 26

BRBS at 3.

The administrative law judge found that employer's termination of claimant constituted a discriminatory act, but that employer's decision was not motivated by animus due to claimant's filing a claim. The administrative law judge found that claimant was terminated for a series of mishaps during the course of his employment for employer, four of which occurred between November 29 and December 2, 1999.

Specifically, on September 27, 1999, claimant either fell through some rotten boards or stepped into a hole on a dock and sustained facial lacerations. CX 1. Subsequently, David Geyer, a site superintendent, testified that he spoke to claimant about his conduct when he saw claimant working between the bed and body of a crane while it was operating, which is a dangerous practice and is in violation of regulations promulgated by the Occupational Safety and Health Administration. Tr. at 89-90. Mr. Geyer testified that claimant responded that he has always performed his job duties in that manner; Mr. Geyer reported the incident to Mr. Wright. Mr. Geyer also witnessed claimant knock over another worker while he was moving a hose, which he attributed to claimant's not paying attention. Tr. at 91. Mr. Wright testified that he had safety concerns about claimant as he had observed claimant several times walking underneath the hammer attached to the arm of the crane. This hammer is used to pound steel I-beams into the ground. Tr. at 109. He also spoke with claimant after receiving Mr. Geyer's report that claimant had worked between the bed and the body of an operating crane. Tr. at 110. Mr. Wright further testified that between November 29 and December 2, 1999, he noted that claimant drove a truck into a compaction hole and fell into a compaction hole as well, claimant walked under the hammer, was knocked down by moving hoses, and was hurt when the battery he was installing exploded. Tr. at 111-112; see *also* EXs 107-108, 110. The administrative law judge found, based on this evidence, that employer did not have a discriminatory motive for firing claimant, as it reasonably discharged claimant before his accident-prone or unsafe behavior escalated to more serious injury or death, and she denied the claim under Section 49. Decision and Order at 14.

Claimant concedes there is substantial evidence to support the administrative law judge's finding that employer believed claimant was not a safe worker. Claimant's Reply Brief at 2. We reject claimant's contention that employer violated Section 49 because his work injury on December 2, 1999, was indisputably part of employer's rationale for discharging claimant. The fact that claimant's unsafe conduct resulted in his sustaining injuries for which employer might be liable for compensation does not *per se* show discriminatory animus necessary to establish a violation of Section 49. In *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4<sup>th</sup> Cir. 1995), the Board held that the fact that the claimant's work injury led to the discovery that she falsified her pre-employment documents, which led to her dismissal, does not necessitate the finding that Section 49 was violated. Despite the role that the work injury played in the events that led to the termination, the Board held that Section 49 was not violated because once the falsification was uncovered, the claimant was treated the same as

other similarly situated employees. *Hunt*, 28 BRBS at 367-370; see also *Brooks*, 26 BRBS at 5. Although there is no evidence regarding employer's treatment of other similarly-situated employees, if any, the absence of such evidence does not support an inference of discriminatory intent under the circumstances of this case, as the administrative law judge acted within her discretion in crediting the testimony of employer's managers regarding claimant's unsafe actions and employer's reason for the discharge. Since substantial evidence supports the administrative law judge's finding that claimant was discharged solely due to his being accident-prone and an unsafe worker, we affirm the administrative law judge's finding that Section 49 was not violated in this case.<sup>1</sup> See *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); see generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, the administrative law judge's finding that employer's termination of claimant did not violate Section 49 of the Act is affirmed.

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<sup>1</sup>Claimant also challenges the administrative law judge's finding that employer did not violate Section 49 because it fired claimant before he filed his claim for the December 2, 1999 injury. The administrative law judge stated, in addition to her other findings, that Section 49 is not applicable until after claimant files his claim. Claimant contends that Section 49 should apply because employer was aware that claimant had sought medical care for his work injury. We need not address the issue of what events trigger the applicability of Section 49 because substantial evidence supports the administrative law judge's finding that, in any event, employer's discharge of claimant was not done with discriminatory intent.

Accordingly, the administrative law judge's Decision and Order finding that employer did not discriminate against claimant in violation of Section 49 is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge