

BRB Nos. 90-2285
and 90-2285A

KATIE MAE HUNT)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	DATE ISSUED:_____
NEWPORT NEWS SHIPBUILDING)	
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and the Order Granting Reconsideration in Part and Amending Order of Theodor P. von Brand, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Granting Reconsideration in Part and Amending Order, and claimant cross-appeals the Decision and Order (84-LHC-3062, 88-LHC-2718) of Administrative Law Judge Theodor P. von Brand 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, a welder, was hired by employer in March 1979. On March 5, 1983, while working on an aircraft carrier, claimant stepped on a hot stud which went through her shoe and into her left foot. Tr. at 37-38, 48-49. Doctors at the shipyard clinic soaked her foot, gave her a tetanus shot and returned her to work. Due to pain and swelling, claimant was not able to return to her usual work the next day, so she went to the clinic where she received crutches and was sent to the MRA shop. Tr. at 50-51. On March 11, 1983, claimant returned to the clinic, again unable to continue

with work. Dr. Lane, a clinic doctor, realized that claimant needed outside treatment. Claimant requested the services of Dr. Kells and the clinic made an appointment for her the following week. Because Dr. Lane believed claimant needed immediate treatment, however, he recommended Dr. Cross, a general surgeon, who had an opening that afternoon. Based on their discussion, and in order for the shipyard to authorize treatment, claimant signed a selection of physician form, initialing Dr. Cross as her choice of physician. Emp. Ex. 20; Tr. at 51-52.

Dr. Cross hospitalized claimant that same day and performed surgery on her foot the next day. After 3-4 weeks of light duty work, Dr. Cross released claimant to return to her usual job on April 11, 1983, but climbing at work caused additional problems, so claimant returned to Dr. Cross. Emp. Ex. 41 at 51; Tr. at 54. On June 25, 1984, because of her continuing problems, Dr. Cross referred claimant to Dr. Webster, an orthopedic surgeon. Dr. Webster performed surgery on July 16, 1984, wherein he excised a neuroma from claimant's left foot. Emp. Ex. 7 at 5-7. Dr. Webster released claimant to return to her regular duties in January 1985. Tr. at 60.

Thereafter, claimant informed the clinic that she was displeased with Dr. Webster's treatment and wanted to be treated by Dr. Ewing, a podiatrist recommended by her attorney. Employer refused to approve the change; however, in a letter dated May 7, 1985, it authorized Dr. Ewing's services for a period of three months until August 7, 1985. Cl. Exs. 3-4. Both claimant and Dr. Ewing testified that claimant's condition improved with conservative treatment and custom-made orthotics. Emp. Ex. 4 at 26, 64; Tr. at 63-64. Despite the limited authorization, claimant continued to see Dr. Ewing after August 7, 1985, and Dr. Ewing continued to prescribe orthotics and limited duty. Emp. Ex. 3.

In October 1986, initiated by the dispute over whether employer should pay for Dr. Ewing's services, the claims examiner recommended that employer authorize an evaluation by another orthopedist. As a result, Dr. Wardell, an independent physician, examined claimant several times. Emp. Exs. 6, 60. In December 1986, Dr. Wardell determined that claimant's condition was well-treated with orthotics alone and that there was no need for surgery. He concluded that she has a zero percent impairment and can return to her full duties. Accordingly, Dr. Wardell found no justification for additional treatment by a podiatrist. Emp. Ex. 6. Dr. Webster agreed with Dr. Wardell's findings, including the zero percent impairment rating, but stated he would continue to treat her foot as needed. Emp. Ex. 7. On May 4, 1987, claimant was discharged from the shipyard for a violation of Rule 10, Falsification of Company Records.¹ Emp. Ex. 42.

At the formal hearing before the administrative law judge, claimant and employer disputed whether employer is liable for payment of medical services provided by Dr. Ewing after August 7, 1985, whether employer discharged claimant in violation of Section 49 of the Act, 33 U.S.C. §948a, and whether claimant is entitled to total disability benefits from the date of discharge. Decision and

¹In response to the dismissal, claimant filed a grievance with the union on May 10, 1987. On June 10, 1987, the union withdrew the complaint. Emp. Ex. 42.

Order at 14-15. The administrative law judge concluded that Dr. Ewing's treatment duplicated that which was already being provided by employer, and he determined that employer is not liable for Dr. Ewing's services. *Id.* at 16. With regard to the alleged Section 49 violation, the administrative law judge inferred animus against claimants as a class from the manner in which employer used pre-trial discovery to investigate claimant's pre-employment medical records. *Id.* at 18-19. As a result, he determined that employer discriminated against claimant and that claimant is entitled to reinstatement and back pay; however, he denied temporary total disability benefits during the period claimant would be receiving back pay. *Id.* at 20.

The administrative law judge then denied employer's motion for reconsideration on the merits, but granted its motion to reopen the record. He accepted employer's evidence that the MRA department no longer exists and that, as of October 30, 1989, there was no work available which claimant was able to perform. Consequently, he held that claimant is entitled to back pay only from May 7, 1987, through October 30, 1989. *See* Amending Order.

On appeal, employer challenges the administrative law judge's findings that it violated the provisions of Section 49 and that claimant is entitled to back pay. Claimant has not responded to this appeal.² BRB No. 90-2285. Claimant cross-appeals the administrative law judge's decision, contending he erred in not holding employer liable for the cost of Dr. Ewing's services.³ Employer responds to the cross-appeal, urging affirmance. BRB No. 90-2285A.

Section 49

Employer contends the administrative law judge erred in finding that it violated Section 49 of the Act when it terminated claimant's employment in May 1987. Specifically, employer argues that it did not discriminate against claimants as a class, that there is no evidence of animus, that the administrative law judge failed to follow his findings that claimant was not treated differently than other employees, and that his decision conflicts with case precedent. Alternatively, employer argues that, since the discharge rule is inflexible, claimant would have been terminated because of her rule violation despite any animus there may have been.

Section 49 prohibits an employer from discharging or discriminating against an employee based on her involvement in a claim under the Act, and if the employee can show she is the victim of such discrimination, she 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 her employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v.*

²In an Order dated June 23, 1992, the Board accepted claimant's brief in BRB No. 90-2285A. It accepted the same brief as a response to employer's appeal in BRB No. 90-2285; however, the brief does not contain any arguments addressing the issues in employer's appeal.

³Employer has paid disability benefits, and claimant does not assert that she is entitled to additional benefits. *See* Emp. Exs. 26, 38.

Newport News Shipbuilding and 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 others. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In the case *sub judice*, Ms. Bakkethun, Mr. Tabb, Ms. Huck, and Mr. Peele testified as to the process leading to claimant's discharge. Ms. Huck, employer's counsel for workers' compensation claims, testified that, while reviewing claimant's medical records, she noticed claimant's history of right foot problems. This information triggered a question of whether there might be a Section 8(f), 33 U.S.C. §908(f), issue to raise. Tr. at 222, 232, 234-235. Further investigation of claimant's clinic medical records and subpoenaed medical records revealed that claimant failed to identify numerous past ailments on her pre-employment medical history form.⁴ *Id.* at 226-233. Ms. Huck constructed a summary of her findings, Emp. Ex. 3 at 22, 10 at 29-30, and informed personnel of her discovery.⁵ Tr. at 235, 237.

Mr. Tabb, the supervisor of employee relations, reviewed the summaries and the original questionnaire filled out by claimant, and charged claimant with a violation of Yard Rule 10, Falsification of Company Records. Tr. at 152-154; *see also* Emp. Ex. 43. He discussed the process with Mr. Peele, claimant's supervisor, who had no objection to claimant's dismissal because he felt the case was "cut-and-dried." Emp. Ex. 72 at 5-7. Ms. Bakkethun, the supervisor of personnel, conducted the meeting and discharged claimant because she did not provide the shipyard with an adequate reason for falsifying the records. Tr. at 126-127, 130, 133. Mr. Tabb and Ms. Bakkethun testified that claimant's discharge was conducted in the same manner as every other discharge of an employee who violated yard rules, and that, regardless of whether due to intent or mistake, all employees who falsify records are discharged. Tr. at 145, 161, 181.

After reviewing this testimony, the administrative law judge found that employer demonstrated that claimant's discharge was handled routinely, in the same manner as all other Rule 10 violators, that all employees found to have falsified records are discharged, and that falsifications are generally discovered by accident. Decision and Order at 12, 17. Nonetheless, he stated that although employer may use a uniform method of investigating falsifications, it may not use the

⁴For example, claimant failed to disclose that she had shortness of breath, that she injured her shoulder, leg, and hip in a 1973 car accident, that she had previous wrist problems (she developed work-related carpal tunnel syndrome in 1980), and that she had a tumor removed from her right foot in 1979 (two months before she was hired). Emp. Exs. 9-10, 24.

⁵According to Ms. Huck, she felt no animus towards claimant and she had no directive to seek out violations, but she anticipated her findings would result in claimant's discharge. Tr. at 238, 240, 273.

discovery procedures or the subpoena power under the Longshore Act "to place each claimant under a magnifying glass[.]" *Id.* at 17-18. Therefore, he found that although the search was initially to determine whether the claim was justified, it "evolved into a search for falsification which could be turned over to Personnel." *Id.* at 18. The administrative law judge then concluded that implementation of Yard Rule 10 discriminates against compensation claimants as a class and violates Section 49 of the Act. *Id.* at 19-20.

We agree with employer's contention that the administrative law judge's finding that it violated Section 49 cannot stand in light of the case precedent. In *Holliman*, the United States Court of Appeals for the Fourth Circuit affirmed the Board's reversal of an administrative law judge's finding that the employer, the same employer as in the case presently before the Board, violated Section 49. The court determined that, because the administrative law judge found that Holliman was discharged for violating the five-day call-in rule, which is uniformly enforced against all employees, including those with personal or occupational injuries, and not for filing a claim, the administrative law judge incorrectly concluded there was discriminatory animus directed at claimants as a class or at Holliman in particular. *Holliman*, 852 F.2d at 759, 21 BRBS at 124 (CRT). As the court explained:

Proper matters for inquiry in a section 49 claim are whether compensation claimants, individually or as a class, are treated differently from like groups or individuals, and whether the treatment is motivated, in whole or in part, by animus against the employee(s) because of compensation claims.

Holliman, 852 F.2d at 761, 21 BRBS at 128-129 (CRT).

More recently, the Board addressed the question of whether this employer violated Section 49 when it terminated an employee for falsifying company records. *Brooks*, 26 BRBS at 1. In *Brooks*, claimant Brooks injured his back at work. When he went to the clinic for treatment, he informed the doctor he had a previous back injury. Brooks was fired later that year for violating Rule 10 because he failed to disclose this previous injury on his pre-employment medical history form. *Brooks*, 26 BRBS at 2. The administrative law judge found there was no Section 49 violation, and the Board affirmed his finding. The Board noted that there was no evidence of a discriminatory act, as, routinely, there is no investigation into whether the omission was intentional or inadvertent, and that Brooks was treated no differently from any other employee who failed to disclose prior injuries. *Id.* at 4. The Board then stated that its conclusion remains the same despite any role the compensation claim may have had in leading employer to discover the omission and terminate Brooks. *Id.* at 5. The Fourth Circuit affirmed the Board's decision. *Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT).

The Board also addressed Section 49 in *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988), wherein it affirmed the administrative law judge's finding of no discrimination or intent to

discriminate in a situation similar to the one before the Board.⁶ The Board stated that where the evidence establishes that a claimant has not been treated any differently from other employees who have violated a company rule by failing to disclose past injuries on their employment applications, there is no Section 49 violation. *Leon*, 21 BRBS at 192. Thus, the fact that prior undisclosed injuries are uncovered during discovery does not establish discriminatory animus because an employer does not violate Section 49 by discharging a claimant for any reason other than for filing a compensation claim. *Tibbs v. Washington Metropolitan Area Transit Authority*, 17 BRBS 92 (1985), *aff'd mem.*, 784 F.2d 1132 (D.C. Cir. 1986). However, if a discharge is even partially motivated by animus against a claimant for filing a compensation claim, the employer has violated Section 49. *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978). If there is a controversy over the motive issue, the administrative law judge must determine the credibility of the conflicting witnesses. *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 300 (1981) (Miller, J., dissenting).

We hold that the administrative law judge's conclusion in this case is contrary to the holdings in *Holliman*, *Brooks*, and *Leon* and that he erred in finding that employer violated Section 49 of the Act. In each of those cases, as in the one presently before the Board, the claimants were discharged for violating shipyard rules which applied equally to all employees. *Brooks*, 26 BRBS at 4-5. Rather than following the precedent that an employer does not violate Section 49 in such situations, the administrative law judge in this case inferred animus from the intensity of Ms. Huck's search, despite crediting employer's witnesses and finding that all Rule 10 violators are terminated and that claimant's discharge followed the routine procedure for such a violation. Although the administrative law judge correctly noted that only claimants under the Act can be subjected to the subpoena power authorized by the Act, this fact alone does not demonstrate a discriminatory animus by employer against claimants as a class, as employer has a legitimate need to investigate issues affecting the applicability of Section 8(f). *See Brooks*, 26 at 4-5. In light of this case precedent, we conclude that the administrative law judge erred in inferring animus from the circumstances of this case. Therefore, we reverse his findings and hold that employer did not violate Section 49 of the Act and that claimant is not entitled to back pay or reinstatement.

Section 7

In her cross-appeal, claimant contends she was not permitted her initial choice of physician, so Dr. Ewing should be considered her choice, despite the passage of so much time since her injury. Further, she argues that Dr. Webster's release to return to full duty work constitutes employer's refusal to provide medical treatment and that Dr. Ewing's treatment is compensable, as, after employer's refusal, it was reasonable and necessary. Employer, in response, argues that claimant exercised her choice by initialling the selection of physician form and going to Dr. Cross, and that she continued to seek care from Drs. Cross and Webster, thereby ratifying her selection.

⁶Claimant Leon failed to disclose serious previous injuries which would have prevented his hiring. Therefore, after he was injured at work and his employer discovered the severity of prior injuries, Leon was discharged for falsification of records. *Leon*, 21 BRBS at 191-192.

The administrative law judge determined that, although employer may have selected Dr. Cross in an emergency, Section 702.405 of the regulations, 20 C.F.R. §702.405, cannot be interpreted to allow claimant an unlimited amount of time after the emergency to select her own doctor; thus, her continued treatment with Drs. Cross and Webster confirmed them as her chosen physicians. Decision and Order at 14-15. Next, he concluded that Section 7(d), 33 U.S.C. §907(d), controls whether employer should be held liable for the cost of Dr. Ewing's services. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Under Section 7(d), the administrative law judge found that Dr. Ewing's treatment duplicated the care given by Drs. Cross and Webster, and was therefore unnecessary, and he held that employer is not liable for the cost of Dr. Ewing's services. Decision and Order at 15-16.

We reject claimant's contention that she was not given the opportunity to select her own physician. Section 7(b) of the Act, 33 U.S.C. §907(b), permits an injured employee to choose an attending physician to provide medical care; however, if, due to the nature of the injury, the employee is not able to make a selection and is in need of immediate treatment, the employer may select a physician. The Board has previously stated that Section 7(b) and its implementing regulation, Section 702.405, contemplate severe injuries, such as unconsciousness or other incapacity, preventing the claimant from selecting a physician. *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 517 (1978), *overruled on other grounds*, *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Claimant, in this case, was neither unconscious nor incapable of selecting a doctor. The evidence establishes that her original choice, Dr. Kells, was unavailable the day claimant needed treatment and that she selected Dr. Cross as her physician in order to receive immediate treatment. Further, the record demonstrates that claimant had previous injuries and was familiar with the process of selecting a treating physician, as well as with the selection of physician form. *See Emp. Exs. 10, 20, 41*. Because claimant continued to obtain treatment with Drs. Cross and Webster for two years, until they released her to return to full duty work, the administrative law judge rationally concluded that they were her physicians of choice. *See Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988);⁷ *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

Under Section 7(d), an employee is entitled to recover medical benefits if he requests his employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Anderson*, 22 BRBS at 23. In this case, it is undisputed that claimant sought employer's authorization for treatment by Dr. Ewing. It is also undisputed that employer initially refused such request and then authorized

⁷In *Senegal*, the Board affirmed the administrative law judge's finding that Dr. Palm was Senegal's initial choice of physician. Despite the fact that he was referred to Dr. Palm by the emergency room which treated him for acetic acid inhalation, the Board considered it significant that Senegal continued to seek care from Dr. Palm until he was released to return to work and that Dr. Palm provided Senegal with all the treatment he needed by referring him to specialists when necessary. *Senegal*, 21 BRBS at 11.

treatment for a limited period of time. Thereafter, employer decided that Dr. Ewing's treatment duplicated that of Drs. Cross and Webster, and it refused to extend the authorization. The administrative law judge credited the opinions of Drs. Cross, Webster, and Wardell, and found that any medical care claimant needed could be obtained from these authorized doctors, as Dr. Webster stated that he would continue to treat her as necessary. Further, the doctors testified that claimant did not need additional treatment from a podiatrist. Therefore, we affirm the administrative law judge's decision to credit the opinions of Drs. Cross, Wardell, and Webster that Dr. Ewing's treatment was duplicative of treatment claimant was already receiving, and we affirm his finding that employer is not liable for the cost of the unnecessary medical treatment provided by Dr. Ewing after August 7, 1985. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Moreover, as claimant received medical treatment from her initial choice, and as employer did not refuse further treatment from that authorized physician, employer is not required to consent to a change of physicians. *See Senegal*, 21 BRBS at 11; 20 C.F.R. §702.406(a).

Accordingly, the administrative law judge's Decision and Order and Order on Granting Reconsideration are reversed insofar as they hold that employer's discharge of claimant violated Section 49. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge