

ROBERT L. HOLMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL	)	DATE ISSUED:
TERMINALS, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Backpay and Penalties of Richard K. Malamphy,
Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins), Newport News, Virginia, for claimant.

R. John Barrett (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured
employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Backpay and Penalties (90-LHC- 2593) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). 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).

Claimant injured his hip and low back on December 22, 1983, in the course of his employment. Employer voluntarily paid claimant temporary total disability benefits from December 29, 1983 to April 13, 1984. 33 U.S.C. §908(b). Claimant attempted to return to work in March 1984, but was unable to do so due to pain. Claimant consulted various medical practitioners who proffered different diagnoses and opinions as to whether or not claimant could return to work. On December 1, 1988, claimant and employer entered into a settlement of claimant's claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i).¹ Claimant asked to return to work in February 1988,

¹Under the terms of the agreement, claimant received \$15,000, plus \$5,000 for medical expenses, as compensation for periods of temporary total disability and alleged permanent partial disability for

based on a release written by Dr. Iglecia. Donald Hawkins, employer's Risk Management Supervisor, informed claimant that he could not return to work at that time because his physical ability to perform his former job had to be clarified. Claimant continued to contact employer asking to be reinstated, and Mr. Hawkins continued to request additional information and medical clarification of claimant's physical condition, allegedly because prior reports in claimant's file, including one from employer's physician, Dr. Snider, indicated that claimant was physically incapable of performing his prior work. Claimant was ultimately allowed to return to work on September 18, 1991, Cl. Ex. 20, following a March 28, 1991, physical examination performed by Dr. Snider and an August 12, 1991, physical capabilities evaluation. Claimant filed a claim pursuant to Section 49 of the Act, 33 U.S.C. §948a (1988), seeking back pay and penalties for the period between January 21, 1988 and September 18, 1991, when he was refused employment.

The administrative law judge found that although claimant established a discriminatory act in that employer had refused to reinstate him, he was not entitled to back pay under Section 49 because the discriminatory act was not motivated by animus, but rather by employer's legitimate concern for the safety of claimant and his fellow workers. On appeal, claimant contends that employer maliciously and with animus placed numerous obstacles in the way of claimant's reinstatement. Employer responds, urging that the administrative law judge's Decision and Order be affirmed.

Section 49 prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act; if the employee can show that he is the victim of such discrimination, he is entitled to reinstatement and back wages. 33 U.S.C. §948a (1988). In order to establish a *prima facie* case of a Section 49 violation, the claimant must establish that the employer committed a discriminatory act motivated by discriminatory animus or intent. *See, e.g., Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). The administrative law judge may infer animus from circumstances demonstrated by the record. *See, e.g., Williams v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 300 (1981). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has stated that "[p]roper 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 v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 761, 21 BRBS 124, 128-29 (CRT)(4th Cir. 1988), *aff'd* 20 BRBS 114 (1987). The circumstances of an action may be examined to determine whether employer's reasons for firing the employee are credible or a pretext for termination based on the filing of a compensation claim. *See Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978).

In the instant case, claimant raises several allegations in support of his contention that employer discriminated against him in his attempts to return to work. Initially, claimant alleges that the first obstacle employer placed in his way was to request through the Accident Review Committee that claimant settle his pending workers' compensation claim and then hold the settlement against him as proof that claimant had "permanent" injuries which prevented him from

claimant's loss of wage-earning capacity due to contested light duty restrictions.

returning to work. Claimant also contends that employer refused to accept Dr. Iglecia's release of claimant for work on the pretext that Dr. Iglecia was a psychologist, whereas in fact Dr. Iglecia is a trained neurologist and psychiatrist who is board-certified in psychiatry and board-eligible in neurology. Claimant further maintains that employer continued to create obstacles by demanding unnecessary additional medical evaluations from Drs. Morales and Snider, and ultimately requiring a physical capabilities evaluation.

After review of the Decision and Order in light of the record, we affirm the administrative law judge's finding that no Section 49 violation occurred in this case. In concluding that employer's refusal to rehire claimant was not based on discriminatory animus, the administrative law judge credited Mr. Hawkins' testimony that his decision not to allow claimant to return to work was grounded in safety concerns for the claimant and his fellow workers, over claimant's contrary assertions regarding the motivating circumstances. With regard to claimant's contentions regarding the Accident Review Committee, Mr. Hawkins testified that the committee was convened at his request in order to review his decision not to rehire claimant when claimant initially approached him in February 1988. Tr. at 38-39; Emp. Exs. Q-1, Q-2. Mr. Hawkins testified that the committee is a joint labor-management committee which reviews individual accidents and the physical condition of certain employees and is chaired by Daniel Harrison, Director of Port Safety. Tr. at 44. Mr. Hawkins and Mr. Harrison stated that the committee refused to make any decision in claimant's case, or in any other case "where there were legal matters pending," and advised him it would meet again when any legal proceedings were over. Tr. at 45; Emp. Ex. S at 8-10, 15-20; Emp. Ex. Q-5. Inasmuch as this evidence indicates that the Accident Review Committee never takes any action while any sort of legal action is pending, the committee's suggestion that claimant "settle" his claim cannot rationally be viewed as retaliatory action based on the filing of a workers' compensation claim; claimant was treated no differently from other employees similarly situated. *See generally Jaros*, 21 BRBS at 26.

The administrative law judge's conclusion that employer's decision not to reemploy claimant was grounded in safety concerns for the claimant and his fellow workers is similarly supported by the record. Employer's alleged concern about claimant's ability to perform his work stemmed from a discharge summary from Chesapeake General Hospital, dated December 1, 1984, and from a November 4, 1986, report from Dr. Snider. The discharge summary, which listed Dr. Morales as claimant's doctor, contained a diagnosis of bulging discs among other conditions. Dr. Snider's November 14, 1986, report stated, "As Mr. Holmes' pain has been virtually continuous for at least the two years that I have known him . . . I have to consider him to be totally disabled for his usual occupation as a longshoreman . . . to the present time." Emp. Exs. J-16, K-5. Given this history, the administrative law judge, acting within his discretion, initially found employer's refusal to rely on Dr. Iglecia's 1988 release based on his being a psychologist was justifiable, as it was supported by Dr. Iglecia's extensive background in psychiatry and the fact that he is not board-certified, but only board-eligible, in neurology. *See Decision and Order* at 15.

Claimant, in addition, asserts that employer created additional obstacles by requiring that he undergo additional medical evaluations by Drs. Morales and Snider. The administrative law judge,

however, found employer's actions in this regard were justified by its safety concerns in view of the prior medical diagnoses. Initially, the administrative law judge noted that employer acted reasonably in seeking further clarification from Dr. Morales beyond his simple statements on prescription slips that claimant was fit to return to duty,² in view of previous medical information indicating that claimant was totally disabled and had bulging discs. The administrative law judge also considered the correspondence which followed between employer and Dr. Morales and concluded that although Dr. Morales issued several reports expressing his opinion that claimant may resume his work, he never expressly addressed employer's concerns. *See, e.g.*, Emp. Exs. J-1, J-9-10; Decision and Order at 15-16. In view of the record, the administrative law judge could reasonably find that employer's insistence that claimant be seen by Dr. Snider was not motivated by discriminatory animus.

Turning to claimant's final assertion that the physical capabilities evaluation was unwarranted, the record reflects that after conducting an examination on March 28, 1991, Dr. Snider sent a report to employer in which he indicated that claimant's left hip pain had completely resolved and he could return to his usual occupation at full duty. Thereafter, in response to employer's inquiry as to whether there was any objective way of assessing claimant's ability to return to full time regular work, Dr. Snider suggested a work assessment. Although claimant correctly contends that Dr. Snider did not suggest the physical capacities evaluation on his own, but rather in response to employer's questioning, the administrative law judge, acting within his discretion, found that employer's actions in requesting the physical capacities evaluation were reasonable.

Inasmuch as the administrative law judge fully considered the evidence before him and drew rational inferences from that evidence, we reject claimant's arguments and affirm the administrative law judge's finding that employer's delay in reinstating claimant was not motivated by animus in violation of Section 49. *See Holliman*, 852 F.2d at 762, 21 BRBS at 129 (CRT); *see generally Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th 7Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992); *Geddes v. Washington Metropolitan Area Transit Authority*, 19 BRBS 261 (1987), *aff'd sub nom. Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT) (D.C. Cir. 1988).

Accordingly, the administrative law judge's Decision and Order Denying Backpay and Penalties is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

²Although the administrative law judge refers to two prescription slips in 1989 and 1990, Dr. Morales' second opinion was actually contained in a medical report dated October 30, 1990. *See* Cl. Ex. 10:A-B.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge