SECTION 49

Section 49 of the Act, 33 U.S.C. §948a, provides that it shall be unlawful for an employer or its agent to discharge or otherwise discriminate against an employee who has either claimed or attempted to claim compensation under the Act from the employer, or who has testified or is about to testify in a proceeding under the Act. If it is demonstrated that the employer did in fact discriminate against the employee on this basis, the employer shall be liable for a penalty payable to the Special Fund. The 1984 amended version of Section 49 increases the penalty for a violation to a sum not less than $1,000 and not greater than $5,000. The 1984 amended version also states that the section does not apply to the discharge or refusal to employ a person who has been adjudicated to have filed a fraudulent claim. The amended Section 49 was effective on the date of enactment of the Act, September 28, 1984.

The statute further provides that any employee so discriminated against must be given his job back and compensated for lost wages, provided that he remains qualified to perform his job duties. It also states that the employer, and not its carrier, is liable for penalties and payments under this section, and any provision in an insurance policy which would relieve the employer from such liability is void.

The regulations accompanying Section 49 are at 20 C.F.R. §§702.271-274. It contains provisions mirroring those in the statute and specifically provides for informal proceedings before the district director followed by formal proceedings before an administrative law judge where the parties are unable to agree. In this regard, Section 702.273 states that the OALJ is responsible for determinations on all disputed issues connected with a discrimination complaint, including the amount of penalty to be assessed.

Thus, notwithstanding the statutory reference to the deputy commissioner's determination of the amount of the penalty, the Board has held that administrative law judges have authority to assess the statutory penalty against a discriminatory employer. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005); *Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1978) (Miller, dissenting). *See* 20 C.F.R. §702.273. *See also Curling v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 770 (1978). Regarding the provision that the employer must reinstate the employee and compensate him for any wages lost due to this discrimination, if the employee is qualified to perform the duties of the employment, the Board has held that determination of the amount of back pay due claimant is a necessary part of a finding of discrimination but may be made by a deputy commissioner after a final decision of the case. *Dill v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 738 (1977).

Section 49 only applies where the discharge of the employee is motivated by a claim under the Longshore Act. *Buchanan v. Boh Bros. Constr. Co., Inc.*, 741 F.2d 750 (5th Cir. 1984) (claimant had no cause of action under Section 49 where his current employer discharged

him due to a claim brought under the Jones Act against a former employer even though claimant was currently engaged in work under the Longshore Act).

Previously, the Board utilized a two-step process in a Section 49 claim. Claimant had to first prove a discriminatory act by employer. The essence of discrimination is in treating like individuals (or groups) differently. *See Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977). In cases arising under Section 49, the burden of proving a discriminatory act is on the claimant. Claimant also must show that the discriminatory act was motivated by a discriminatory animus or intent. *Geddes v. Benefits Review Board*, 735 F.2d 1412, 16 BRBS 88(CRT) (D.C. Cir. 1984), *rev'g Geddes v. Washington Metro. Area Transit Auth.*, 15 BRBS 296 (1983); *Gondolfi v. Mid-Gulf Stevedores, Inc.*, 11 BRBS 295 (1979), *aff'd*, 621 F.2d 695, 12 BRBS 394 (5th Cir. 1980).

Once claimant has met his burden, a rebuttable presumption arose that the employer was motivated at least in part by claimant's filing of his claim. The burden then shifts to employer to prove that it was not motivated, even in part, by claimant's exercising his rights under the Act. *Geddes*, 735 F.2d 412, 16 BRBS 88(CRT); *Tibbs v. Washington Metro. Area Transit Auth.*, 17 BRBS 92 (1985), *aff'd mem.*, 784 F.2d 1132 (D.C. Cir. 1986).

However, in light of *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the Board held that it will no longer follow the burden-shifting scheme of *Geddes v. Benefits Review Board*, 735 F.2d 1412, 16 BRBS 88(CRT) (D.C. Cir. 1984). The Board held that proof of a Section 49 violation now involves a three-step process, much like the shifting-burdens analysis of Section 20(a). The proper standard for analyzing claims under Section 49 is: 1) claimant must establish a prima facie case that his employer committed a discriminatory act motivated by discriminatory animus; if he does so, he is entitled to a rebuttable presumption that his employer violated Section 49; 2) employer's burden on rebuttal is one of production, that is, it must produce substantial evidence that it acted for non-discriminatory reasons; if it does so, the presumption falls from the case; 3) claimant bears the ultimate burden of persuasion and must prove by a preponderance of the evidence that his employer committed a discriminatory act against him motivated by his claim for compensation under the Act. *Babick v. Todd Pac. Shipyards Corp.*, 49 BRBS 11 (2015).

The Board has refused to consider the issue of a Section 49 violation where it was not raised first before the administrative law judge. *Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982). Furthermore, the Board has refused to consider any claim of discrimination alleged to have occurred after the administrative law judge's decision since this issue was not first raised and decided by an administrative law judge. *Swain*, 14 BRBS at 660. The administrative law judge may not raise Section 49 for the first time in his Decision and Order. The administrative law judge's authority to raise a new issue pursuant to 20 C.F.R.

§702.366(b) expires once a compensation order is issued. *Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985).

Employer does not violate Section 49 by discharging claimant for any reason other than for filing a compensation claim. *Tibbs*, 17 BRBS 92 (Board reversed the administrative law judge's finding that employer violated Section 49 by not reinstating claimant once he presented medical substantiation that his absences from work were due to a work-related injury and he was able to return to work, holding employer's decision to fire and not reinstate claimant was fully justified by his overall record of absenteeism); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981) (Miller, dissenting), *aff'd on other grounds*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982) (any animus of employer toward claimant was due to claimant's union activities, not his filing a claim).

Section 49 has been violated if the discharge was even partially motivated by animus against a claimant who files a compensation claim. *Machado v. Nat'l Steel & Shipbuilding Co.*, 9 BRBS 803 (1978); *Winburn*, 9 BRBS 363; *Dill*, 6 BRBS 738. It makes no difference that the discharge may have been motivated by other factors as well. *Machado*, 9 BRBS 803; *Winburn*, 9 BRBS 363. Because proof of discriminatory animus is seldom neat or obvious, the administrative law judge must carefully examine the circumstances surrounding the discharge to determine whether the employer's reason for firing the employee is the actual motive or a mere pretext. Further, proof of animus may be inferred from the circumstances. *Wallace v. C & P Tel. Co.*, 11 BRBS 826 (1980); *Martin v. Gen. Dynamics Corp.*, 9 BRBS 836 (1978); *Curling,* 8 BRBS 770. The manner in which the claimant is treated in relation to the employer's customary employment practices is also a factor to be considered in Section 49 adjudication. *Wallace*, 11 BRBS 826; *Machado*, 9 BRBS 803; *Winburn*, 9 BRBS 363; *Curling*, 8 BRBS 770.

Applying these principles in *Machado*, 9 BRBS 803, the Board affirmed a finding that no violation occurred where claimant was absent from work without medical authorization in violation of the contract and his termination followed established rules and procedures. In contrast, in *Winburn*, 9 BRBS 363, the Board stated that the administrative law judge could rationally infer that employer's stated reason for firing claimant was a pretext where employer did not follow established procedures in terminating claimant and other circumstances supported the administrative law judge's inference that the firing was due to the compensation claim. *See also Dill*, 6 BRBS 738 (Section 49 violation affirmed where administrative law judge found that reasons given by supervisor for termination were unlikely to lead to this result and that the supervisor was annoyed by claimant's concerns about his physical discomfort and did not want to be bothered by his complaints).

Where the motive for discharge is a matter of controversy, the administrative law judge must weigh the credibility of conflicting witnesses. In *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 300 (1981) (Miller, dissenting), the claimant was discharged for falsifying a medical record in anticipation of a compensation claim. The

administrative law judge considered this a *per se* violation of Section 49 and did not consider employer's evidence. The Board remanded for the administrative law judge to consider the credibility of all witnesses since employer's motive may have been the general policy of discharging anyone who falsified company records.

Section 49 is not limited to discharges and may include discriminatory treatment of compensation employees under a collective bargaining agreement. *Dickens v. Tidewater Stevedoring Corp.*, 12 BRBS 703 (1980), *aff'd*, 656 F.2d 74, 13 BRBS 629 (4th Cir. 1981). In *Dickens*, however, the Board determined that the collective bargaining agreement did not discriminate against compensation employees.

The administrative law judge does not have the authority under Section 49 to determine whether or not an employee was dismissed for justifiable cause under the terms of an employment contract or collective bargaining agreement. *See, e.g., Machado*, 9 BRBS 803; *Winburn*, 9 BRBS 363; *Dill*, 6 BRBS 738. The only issue before the judge is the existence of discriminatory animus for filing a compensation claim.

Digests

To establish a violation of Section 49, claimant must establish that employer committed a discriminatory act motivated by discriminatory animus or intent. The Board held that claimant's being medically unable to work did not reflect discrimination when he was not rehired for that reason. *Nooner v. Nat'l Steel & Shipbuilding Corp.*, 19 BRBS 43 (1986) (note that in stating the general legal standard under Section 49, this case incorrectly states that claimant must establish that employer committed a discriminatory act which was motivated by discriminatory animus or intent due to the filing of a compensation claim against employer; as stated above, claimant must only show that employer committed a discriminatory act motivated by discriminatory animus, at which point the burden shifts to employer to show the act was not motivated in part by the filing of a compensation claim against employer).

In a case where employees were ordinarily discharged only for contractual violations, another employee with high blood pressure was allowed to continue working, and claimant's physicians released him for his usual work and he performed it satisfactorily, the Board held that the administrative law judge could find it discriminatory to fire him, as the record implied that the true motive was employer's chagrin at having to employ someone with whom it just settled a claim for permanent total disability. An administrative law judge may assess a higher fine, pursuant to amended Section 49, for a violation which occurred before the effective date of the 1984 Amendments. *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986) (note that the statement of the general legal standard here contains the same error as in *Nooner*).

Where the administrative law judge did not provide a rationale for determining that employer's reassignment of claimant to a new job in the same facility constituted a "discharge," and where he did not address evidence of record suggesting that claimant may not have suffered an earnings loss as a result of the reassignment, the Board remanded the case for a determination on whether employer's action was a discriminatory act under Section 49. The Board instructed the administrative law judge to calculate the amount of lost earnings, if any, on remand, as this calculation must be made in order to determine whether employer committed a discriminatory act. *Rayner v. Mar. Terminals, Inc.*, 19 BRBS 213 (1987).

The Board affirmed the administrative law judge's conclusion on remand that employer's removal of claimant's name from the crane-rotation list constituted a Section 49 violation. The administrative law judge rationally determined that employer's alleged concerns with safety and health were pretextual. The Board also held that the administrative law judge properly credited GAI payments and holiday and vacation pay received by claimant against employer's back-pay liability under Section 49. These payments are not "collateral sources" of income for which employer does not receive credit toward its back-pay liability. *Rayner v. Mar. Terminals, Inc.*, 22 BRBS 5 (1988).

The Board affirmed the administrative law judge's denial of a Section 49 claim, as the administrative law judge rationally credited testimony that claimant would have been rehired had he demonstrated his medical fitness and completed a driving test. The Board reasoned that since the administrative law judge's implicit finding of no "discriminatory act" was proper, the administrative law judge did not err in failing to require employer to demonstrate that its actions toward claimant were unrelated to claimant's having filed a compensation claim. *Geddes v. Washington Metro. Area Transit Auth.*, 19 BRBS 261 (1987), *aff'd sub nom. Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988).

The D.C. Circuit affirmed the Board's decision to uphold the denial of a Section 49 claim, reasoning that the existence of a discriminatory act was not established. The court noted that the administrative law judge's finding of no discriminatory act was not inconsistent with the administrative law judge's earlier finding that employer intended to induce claimant to not return to its employ, in that claimant never attempted to resume his job with employer, thus rendering employer's intentions irrelevant. *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988).

The Board reversed the administrative law judge's determination that employer's "five-day call-in" rule, under which certain absent employees could be terminated if they failed to "call in" to work every five days, discriminated against longshore claimants as a class, and that its application in this case thus constituted a Section 49 violation. The Board reasoned that, because employer's termination of claimant's job was based on the existence of this established rule rather than on "retaliation or punitive motive," no Section 49

violation had occurred, but indicated that employer's decision to implement the rule in the situation presented by this case was somewhat harsh. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 114 (1987), *aff'd*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988).

The Fourth Circuit affirmed the Board's decision that employer did not violate Section 49 where the "five-day call-in" rule was inflexibly applied to all employees, and enforced against persons absent due to both personal or occupational injuries. Thus, there was no evidence of discriminatory animus or intent. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988).

The Board affirmed the administrative law judge's determination that employer's concededly standard practice of seeking "voluntary-quit" agreements from employees obtaining settlements of their longshore claims reflected the "discriminatory intent" necessary to establish a Section 49 violation. The Board noted that whether or not claimant had in fact orally consented to relinquish his job as a condition of his settlement, the very fact that employer attempted to procure such consent supported the administrative law judge's finding of discriminatory intent. *Nance v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 109 (1987), *aff'd*, 858 F.2d 182, 21 BRBS 166(CRT) (4th Cir. 1988), *cert. denied*, 492 U.S. 911 (1989).

Affirming the Board's determination, the Fourth Circuit held that the administrative law judge, in deciding the Section 49 claim, properly excluded evidence showing that claimant had orally agreed to resign from his job as part of a Section 8(i) settlement, and properly found that employer's stated desire to induce claimant to resign established discriminatory intent within the meaning of Section 49. *Norfolk Shipbuilding & Drydock Corp. v. Nance*, 858 F.2d 182, 21 BRBS 166(CRT) (4th Cir. 1988), *cert. denied*, 492 U.S. 911 (1989).

Although employer allegedly discharged claimant for falsifying information on his pre-employment application, the Board held that the administrative law judge's failure to consider the fact that employer discharged claimant only a few weeks after he filed his workers' compensation claim, possibly in violation of Section 49, violated the APA, and required remand. *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

The administrative law judge properly found that employer's policy of discharging employees for material falsifications on their employment applications did not violate Section 49 and that the evidence failed to establish that the termination claimant's employment was motivated by the requisite animus or ill will to constitute a violation of Section 49. *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988).

The Board affirmed the administrative law judge's finding that Section 49 was not violated where claimant was discharged for intentionally falsifying company documents. The administrative law judge found that the company policy was invariable and claimant failed

to establish that he was treated differently than other employees who failed to disclose prior injuries on employment applications. *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 Board reversed the administrative law judge's finding that employer violated Section 49. It held that where all employees who falsify company records were terminated and where claimant's termination for falsifying company records followed the routine procedure for such a violation, employer had not discriminated against claimant. Additionally, the Board concluded that employer had not discriminated against claimants as a class merely because claimants were the only employees subjected to the subpoena power of the Act, as employer had a legitimate need to investigate issues affecting the applicability of Section 8(f). Therefore, the Board held that the administrative law judge erred in inferring discriminatory animus from employer's investigation of claimant's medical history in this case. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

Although the administrative law judge found that employer's disciplinary hearing was not impartial, the Board affirmed the administrative law judge's finding that employer did not violate Section 49 when it terminated claimant since claimant was treated no differently than other employees subject to disciplinary hearings. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

The Fifth Circuit held that employer did not discriminate against claimant under Section 49 of the Act by terminating claimant after his industrial injury. The court noted that the record supported the administrative law judge's finding that claimant was terminated because he failed to medically document his absences from work. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999)

The Board held that the administrative law judge erred in dismissing the issue of Section 49 discrimination from the case in a summary decision where he did not address the contested issues of fact relevant to employer's motivation for terminating claimant and where the administrative law judge did not go through the prescribed analysis and apply the proper legal standards involved in consideration of the Section 49 issue. Moreover, the administrative law judge erred in finding the Section 49 claim barred by giving collateral estoppel effect to the district court's judgment in claimant's ADA suit. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

The Board affirmed the administrative law judge's finding that claimant was discharged due to her claim for compensation in violation of Section 49 of the Act as the administrative law judge properly examined the totality of the circumstances regarding the discharge. The administrative law judge found that employer discharged claimant for "pretextual reasons," and that employer had not established that it was not motivated, even in part, by claimant's

exercise of her rights under the Act. Claimant was fired for receiving an authorized employee discount. The Board affirmed the administrative law judge's finding that claimant should be reinstated to her former position in view of employer's violation of Section 49, until claimant's ability to work could be assessed after she reached maximum medical improvement following surgery. The Board agreed with the Director's interpretation that, in view of the silence of the Act and regulations, this method insures the availability of reinstatement as a remedy, which otherwise would be unavailable to disabled claimants who are not immediately able to return to work. As the Board affirmed the administrative law judge's finding that claimant was discharged in violation of Section 49, the Board remanded the case to the administrative law judge, rather than the district director as urged by the Director, for assessment of a monetary penalty pursuant to Section 49 of the Act and its implementing regulation, 20 C.F.R. §702.273. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

Section 49, in conjunction with Section 702.271(d), provides for recovery of "loss of wages arising out of discrimination" only if claimant is qualified to return to his former employment. In this case, the administrative law judge found claimant could not perform his former work as a marine superintendent as of the date of injury. The Board therefore reversed the administrative law judge's order that employer pay claimant contractual short-term disability benefits in addition to his compensation under the Act, since the payment of the short-term disability benefits in this case were premised on allowing claimant a recovery for lost wages, a remedy which is unavailable to him under the plain language of Section 49. In a footnote, the Board stated that in light of its holding, it need not address whether the administrative law judge had the authority to order employer to pay the claimant the short-term disability benefits provided by his employment contract under any provision of the Act, or whether such benefits are a substitute for lost wages. *G.M. [Meeker] v. P & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009).

In this case, claimant was injured for the seventh time during his employment. Employer paid some compensation and then claimant filed a claim for additional benefits, for which employer paid another day of benefits. Two months later, after having had a final investigation into the accident, employer suspended claimant three days for unsafe behavior. The administrative law judge found that claimant established a discriminatory act, the suspension, following the filing of his claim. The administrative law judge rejected employer's assertion that the suspension was due to safety violations, and he found that employer did not rebut the presumed Section 49 violation. Accordingly, he awarded claimant three days of back pay and penalized employer $4,000. Under the new three-part analysis adopted in this case, the Board held that employer produced substantial evidence that the suspension was not due to the filing of the claim, as one of the deciding officials stated he was unaware that a claim had been filed. The Board remanded the case for the administrative law judge to determine whether claimant established that the suspension was motivated by his filing a compensation claim. *Babick v. Todd Pac. Shipyards Corp.*, 49 BRBS 11 (2015).

In analyzing a claim under Section 49, the administrative law judge must consider the circumstances of the action taken against the employee to determine whether the employer's reason for the action is the actual motive or mere pretext. The manner in which the claimant is treated in relation to the employer's customary employment practices may support an inference that employer's action was retaliatory. However, the issue does not concern whether an employer may discipline its employee for the occurrence of work accidents or whether such discipline is objectively reasonable: the issue is whether the discipline was due to the filing of the compensation claim. Thus, the administrative law judge here erroneously based his finding that employer discriminated against claimant on employer's unreasonably "blaming" claimant for his work accident. *Babick v. Todd Pac. Shipyards Corp.*, 49 BRBS 11 (2015).

Section 5(a) of the Act makes exclusive an employer's liability for compensation under Sections 7, 8 and 9 of the Act. Section 49 is omitted from the Act's exclusivity provision. However, the court held that, under the doctrine of implied pre-emption, a tort claim for retaliatory discharge made by an employee who claimed or attempted to claim compensation under the Act, is pre-empted. *Sickle v. Torres Advanced Enter. Solutions, LLC*, 884 F.3d 338, 52 BRBS 7(CRT) (D.C. Cir. 2018).