

DONALD WOOLFOLK)
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 Claimant-Petitioner)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 04/27/2006
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West, Hampton, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-02402) of Administrative Law Judge Daniel A. Sarno, Jr., 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 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).

The only issue presented by this appeal is whether the administrative law judge erred in determining that employer's discharge of claimant on April 1, 2004, did not violate Section 49 of the Act, 33 U.S.C. §948a. Claimant, a welder, suffered a work-related knee injury on September 10, 2003. After claimant visited employer's shipyard clinic on a number of occasions, employer provided claimant with a job within his restrictions. Claimant subsequently sought additional medical treatment for his ongoing knee complaints. Following the preparation of a criminal background investigation and a

review of claimant's application for employment, employer discharged claimant effective April 1, 2004, for violating Yard Rule 10 which prohibits the falsification of company records. On April 4, 2004, claimant filed a claim seeking benefits under the Act.

In his Decision and Order, the administrative law judge awarded claimant medical benefits, but denied claimant's claim for permanent partial disability compensation, finding that claimant had not met his burden of establishing a loss of overtime prior to his discharge by employer. The administrative law judge additionally found that employer's discharge of claimant did not violate Section 49 of the Act, and that consequently claimant is not entitled to benefits for any loss in wage-earning capacity that he may have experienced following his April 1, 2004, termination by employer.

On appeal, claimant contends that the administrative law judge erred in finding that employer's discharge of claimant did not violate Section 49 of the Act. Employer responds, urging affirmance of the administrative law judge's decision.

Section 49 prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim 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) (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 *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996). The essence of discrimination is in treating the claimant differently than other employees. *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In the instant case, claimant contends that the evidence of record establishes that employer had a discriminatory motive when, after claimant inquired into additional medical treatment for his knee condition, employer initiated a criminal background investigation of claimant; in this regard, claimant avers that the criminal background report procured by employer was inaccurate and unreliable, and that employer improperly relied upon the contents of that report in determining that claimant falsified company records in violation of Yard Rule 10.¹ Based upon testimony provided by Mr. Franklin, a

¹ If, during the investigation of a claim for a work-related injury, an employer discovers that an employee violated a company rule, and the employee thereafter is treated like other employees who have violated the rule, the employer has not violated Section 49. See *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364

supervisor of employee relations for employer, the administrative law judge rationally found that claimant had been terminated based upon his violation of Yard Rule 10, which states that an employee who provides false or misleading information to employer is to be discharged. Mr. Franklin testified that he was unaware of any employee who had violated Yard Rule 10 who had not been discharged, and that claimant's discharge on April 1, 2004, was unrelated to his filing of a claim for compensation under the Act.²

Although claimant challenges the accuracy of the March 2004 criminal background report prepared for employer which was the basis for employer's decision to terminate claimant, claimant concedes that because he could not recall the extent or totality of his prior criminal record at the time that he filled out his application for employment, that application did not document certain prior criminal behavior. Tr. at 16, 36-37; Cl. br. at 13. In addressing claimant's testimony regarding this omission from his employment application, the administrative law judge found it unlikely that claimant was unable to recall a criminal conviction which occurred in 1989, but was able to remember other convictions occurring in 1973, 1975, and 1977. Additionally, the administrative law judge concluded that claimant's subsequent attempts to explain to his supervisor the dispositions of his later convictions, rather than to reiterate his position that he had forgotten the events of 1989 when he filled out his employment application, lead him to the conclusion that claimant purposefully omitted those later events from his employment application. Decision and Order at 7-8. Thus, the administrative law judge rationally rejected claimant's assertion that the omissions were due only to a faulty memory. Moreover, the administrative law judge's subsequent conclusion that, regardless of the reason for the omissions, they establish a violation of Yard Rule 10 is supported by the record. *Id.*

Having found that claimant violated an employment rule providing grounds for dismissal, the administrative law judge found that claimant was treated in the same manner as similar employees. *Id.* Claimant has offered no evidence that he was treated differently from other employees in like circumstances, and the administrative law judge's finding is supported by Mr. Franklin's testimony that, in his experience, all employees who violate Yard Rule 10 are terminated immediately. As claimant's termination in the instant case was in accordance with employer's established policy involving violations of Yard Rule 10, we affirm the administrative law judge's finding

(1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

² While claimant on appeal contends that he had filed a claim under the Act at this time, the parties stipulated that claimant's claim for benefits was filed on April 4, 2004. JX 1; CX 4.

that claimant failed to establish a discriminatory act.³ *See, e.g., Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Manship*, 30 BRBS at 178. The administrative law judge's determination that employer did not violate Section 49 of the Act when it terminated claimant therefore is affirmed.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ While noting that there does not appear to be any exception to Yard Rule 10, the administrative law judge additionally found that claimant's employment application incorrectly stated that he had experienced no prior problems with his knee. Decision and Order at 7. Pursuant to our affirmance of the administrative law judge's determination that claimant's omission of criminal activity from his employment application placed claimant within the purview of Yard Rule 10, we need not address claimant's allegation that he corrected this deficiency in later documents.