BRB No. 92-1017

DAVID E. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK & WESTERN RAILWAY COMPANY	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	DECISION and ORDER

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

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

John Y. Richardson, Jr. and Christopher R. Papile (Williams Kelly & Greer, P.C.), Norfolk, Virginia, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2313) 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).

Claimant, who had worked as a yard brakeman for employer at its Lambert's Point facility since October 1980, allegedly sustained an injury to his neck and back on the night shift of April 12, 1988, while trying to release a hand brake. Claimant testified that he mentioned the injury to the engineer and conductor who were working on the same shift. He continued to work his regularly scheduled shifts, allegedly in great pain, until April 25,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

1988, when he made a formal report of injury. Claimant further testified that he was aware that his failure to quickly report his injury was a violation of employer's company Rule N which requires employee notification of any injuries. Claimant consulted Dr. Bliss, who diagnosed severe sprain cervicordal spine and possible skeletal or disc injury of cervico-dorsal spine. Cl. Ex. 2. Dr. Bliss referred claimant to Dr. Loxley, an orthopedic surgeon, who opined that claimant had a low back and cervical strain by history. Cl. Ex. 4a. Dr. Loxley noted, however, that as of the date of the examination, May 24, 1988, claimant had recovered from whatever injury he sustained at work and recommended that he return to work. Cl. Ex. 4b.

Following the filing of the formal accident report, employer conducted an investigation to determine the events surrounding the injury. Emp. Ex. 2; Tr. at 68, 95. A second formal investigation followed to explore alleged discrepancies. Emp. Ex. 3. As a result of the later investigation, employer determined that claimant falsified his injury. He was therefore discharged on June 22, 1988. Ex. 1; Tr. at 68, 95. Claimant appealed his termination through negotiated procedures with union representation, but his grievance was denied and his termination was left in effect. Claimant thereafter filed his claim under the Act on February 27, 1990, seeking temporary total disability compensation from April 25, 1988 through May 23, 1988 and a remedy under Section 49 of the Act, 33 U.S.C. §948a.

The administrative law judge found that claimant met the status requirement of Section 2(3), 33 U.S.C. §902(3), as well as the situs requirement of Section 3(a), 33 U.S.C. §903(a). He then found that claimant's discharge did not violate Section 49 of the Act and ultimately denied compensation based on his determination that claimant did not establish that his back injury was work-related. Claimant appeals both the administrative law judge's finding that claimant's discharge did not involve a Section 49 violation and his finding that claimant's back injury was not work-related. Employer responds, urging affirmance.

In order to establish a *prima facie* case of a Section 49 violation, 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 appellate 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'g* 20 BRBS 114 (1987). The circumstances of the discharge 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).

Claimant contends on appeal that his discharge was a discriminatory act in violation of

Section 49. In addressing this issue, the administrative law judge found that there was no evidence that employer's discharge of claimant involved a discriminatory act. The administrative law judge noted that the alleged injury occurred on April 13, 1988, and that claimant knowingly failed to comply with employer's Rule N which requires an injured employer to promptly report an injury to his immediate supervisor. The administrative law judge further noted that employer immediately commenced a formal inquiry into the circumstances surrounding the injury and that claimant was eventually discharged for falsifying an injury. The administrative law judge concluded that as claimant failed to show that he was treated differently from any other employees similarly situated, he failed to establish that his discharge involved a discriminatory act. The administrative law judge further determined that as claimant did not file his claim until well after his termination, and as employer's superintendent, Charles Wehrmeister, testified that employer did not even anticipate that a claim would be filed at the time of the firing, claimant failed to establish that his discharge was motivated by discriminatory animus. Decision and Order at 8-9.

Claimant argues on appeal that employer's allegation that he falsified his injury amounted to harassment to deter him from filing a claim and reflects discriminatory animus on employer's part. Claimant, however, does not specify any evidence which would establish that he was treated differently from any other employee who failed to promptly report an accident in violation of company Rule N and who was subsequent found, after a formal investigation, to have falsified an injury. As claimant failed to meet his burden of proof, we affirm the administrative law judge's finding that claimant did not establish a *prima facie* case under Section 49 by showing that employer's discharge of claimant involved a discriminatory act. *See Holliman*, *supra*; *see generally 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). As we affirm the administrative law judge's finding that claimant did not establish a discriminatory act under Section 49, we need not address his contention that his firing was motivated discriminatory animus on employer's part. *See Holliman*, 852 F.2d at 761, 21 BRBS at 128-129 (CRT).

We also reject claimant's assertion that the administrative law judge erred in finding that his back condition was not work-related. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp*, 22 BRBS 170 (1989), *aff'd* 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the present case, the administrative law judge stated that as claimant suffered a harm, a back injury, and as working conditions existed which could have caused the harm, *i.e.*, claimant's efforts to manually "knock off the hand brake," claimant was entitled to the benefit of the Section

20(a) presumption. The administrative law judge then determined that there was substantial evidence in the record to rebut the presumption. In so concluding, the administrative law judge found claimant's uncorroborated testimony that he told two fellow employees about his injury on the night it occurred unpersuasive, noting that these employees denied that they had in fact been informed of the injury and that their denials were credible,[1] and inconsistent with his failure to file a mandatory report of that injury with his immediate supervisor. The administrative law judge further concluded that claimant's conduct in this regard led to the inference that he did not suffer an injury to his back at work on the shift in question. Decision and Order at 8 n.8. After considering the evidence in the record as a whole, the administrative law judge concluded that while the medical reports indicated that claimant sustained a back injury, the weight of the evidence failed to establish that the alleged work incident occurred. The administrative law judge further determined that with the exception of claimant's discredited testimony, there was clearly no basis in the record for finding claimant's injury to be work-related. *See* Decision and Order at 9.

On appeal, claimant maintains that it was irrational for the administrative law judge to find rebuttal established based on the stipulation regarding the testimony of fellow employees. Claimant asserts that as this stipulated statement was not given under oath or subject to cross-examination and as the administrative law judge had no opportunity to observe the witnesses' demeanor, it does not provide substantial evidence to rebut claimant's credible allegation of injury.

After review of the record, we affirm the administrative law judge's denial of benefits, as his finding that claimant did not establish that his injury occurred as alleged is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 359. We note that evidence as to whether claimant sustained the alleged injury should have been weighed in determining whether the Section 20(a) presumption was invoked; it is claimant's burden to establish that an accident at work which forms the basis for his claim did, in fact, occur. *See Darnell v. Bell Helicopter, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984); *Jones v. J. F. Shea Co.*, 14 BRBS 207 (1981). Contrary to claimant's assertion, the administrative law judge acted within his discretion in discrediting claimant's account of the incident in question based on his statement that he told two co-workers of his accident and the co-workers' denial that he had done so. The administrative law judge did not err in relying on the stipulation as to their testimony. Claimant stipulated to the content of the testimony, which directly impeached his credibility. The administrative law judge further found this statement consistent with the fact that claimant failed to file a mandatory report of injury with his supervisor. He then inferred from these facts that claimant did not suffer an injury to his back at work on the shift in question. This finding establishes that claimant did not prove an element of his *prima facie* case. As claimant now fails to establish any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm his denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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[1]The administrative law judge noted that the employees' denials were received into evidence by stipulation that, if they were to testify, they would state that claimant did not inform them of an injury during the shift they worked together.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge