

BRB No. 97-1510

LAWRENCE M. SHORT)
)
 Claimant-Petitioner) DATE ISSUED:
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 v.)
)
 NEWPORT NEWS SHIPBUILDING AND)
 DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

John H. Klein and Matthew L. Kraft (Rutter & Montagna, L.L.P.),
Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia,
for self-insured employer.

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

Claimant appeals the Decision and Order (94-LHC-1816; 95-LHC-2657) of
Administrative Law Judge Richard K. Malamphy 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 applicable law. *O'Keeffe v.*
Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C.
§921(b)(3).

Claimant, a welder, suffered a work-related injury to his right index finger on September 1, 1985, and a work-related injury to his back on October 11, 1985. The parties stipulated before the district director as to claimant's entitlement to benefits for the finger injury. With regard to the claim for the back injury, employer paid claimant benefits for various periods of temporary total and partial disability. In addition, employer provided claimant a job within his restrictions at its facility. Employer discharged claimant effective June 15, 1988, for violating a company rule which prohibits stealing company property. Specifically, claimant was discharged for cashing a duplicate workers' compensation check for his finger injury.

The administrative law judge found that employer's discharge of claimant did not violate Section 49 of the Act, 33 U.S.C. §948a. The administrative law judge further found that claimant is not entitled to any benefits after his discharge because employer had provided claimant with a suitable job at his full pre-injury wage. On appeal, claimant contends that the administrative law judge erred in failing to find that employer's discharge of claimant violated Section 49 of the Act, and in failing to find claimant entitled to continuing partial disability benefits after his discharge. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge's determination that employer did not violate Section 49 is in error, since his discharge was due to his claim for the finger injury. Claimant argues that under the clear language of Section 49, an employer can avoid a claim of retaliatory discharge only where a claimant has been adjudicated to have filed a fraudulent claim. Claimant contends that inasmuch as no such adjudication occurred in this case under 33 U.S.C. §931(a), employer's discharge of him violated Section 49.

Section 49 of the Act provides that it is unlawful for an employer to discharge or in any manner discriminate against an employee because such employee has claimed or attempted to claim compensation from employer under the Act. The discharge of a person who has been adjudicated to have filed a fraudulent claim for compensation is not a violation of this section. Contrary to claimant's contention, however, this is not the only way an employer may escape liability under Section 49. Rather, Section 49 is violated only if an employer discriminates against an employee *because* he has claimed or attempted to claim compensation under the Act. 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 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). In order for claimant to make a *prima facie* case of a Section 49 violation, he must show that employer

committed a discriminatory act motivated by discriminatory animus or intent. *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 administrative law judge may infer animus from circumstances demonstrated by the record. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

In the instant case, the supervisor of employee relations, Mr. Lee, testified that the labor agreement establishes yard rules, the first of which pertains to stealing company property and provides discharge as a sanction for the first offense. Ms. Schnake, a former claims analyst for employer, who the administrative law judge found credible as she had no association with employer for many years, stated in her deposition that in January 1988 a check was issued to claimant in payment of the stipulated permanent partial disability award for claimant's finger injury. Her notes from early February 1988 indicate that claimant's former counsel reported that the check had not been received, and employer issued a second check to claimant in March. In early June, employer became aware that claimant had in fact cashed both checks. Claimant admitted that he had cashed both checks, although he denied requesting the duplicate check and even being aware that he had received a prior check for the same amount when he cashed the second check. Claimant was discharged after employer's investigation revealed that the second check was requested after the first check had been cashed.

We affirm the administrative law judge's finding that the discharge does not violate Section 49. The administrative law judge found that although the record does not establish a clear-cut case of fraud on claimant's part, he noted that claimant made no attempt to verify his entitlement when he received the second check in March.¹ While noting that claimant was receiving compensation during the first six months of 1988 for his back injury, the administrative law judge found that claimant was terminated for cashing a check for benefits to which he was not entitled and not because he had filed a claim under the Act or was in receipt of weekly benefits. Moreover, Mr. Lee testified that no other sanction is ever imposed for violation of the rule at issue. The administrative law judge therefore rationally concluded that there is no basis for finding a violation of Section 49 inasmuch as the record does not establish animus or that the reason for claimant's dismissal was a pretext based on the filing of a claim. *Hunt*, 28 BRBS at 364 (employer does not run afoul of Section 49 for discharging claimant for violation of a company rule discovered during

¹Claimant's former counsel had no records pertaining to the duplicate check nor any recollection concerning the duplicate check.

investigation of claim for Section 8(f) relief); *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). Consequently, we affirm the administrative law judge's findings as supported by substantial evidence and in accordance with law.

Next, claimant contends that the administrative law judge erred in failing to find that he is entitled to a continuation of partial disability payments for his back injury following his discharge. Sections 8(c)(21) and (e) of the Act, 33 U.S.C. §908(c)(21), (e), provide for an award for partial disability benefits based on two-thirds of the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. The wage-earning capacity of an injured employee is determined by his actual post-injury earnings if such earnings fairly and reasonably represent his wage-earning capacity. See 33 U.S.C. §908(h). The fact that claimant received actual post-injury wages equal to his pre-injury earnings does not mandate a conclusion that he has no loss in wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). Actual earnings in a suitable job lost by claimant for reasons related to his misconduct, like any other suitable job claimant holds post-injury, should be considered by the administrative law judge in determining claimant's post-injury wage-earning capacity. *Mangaliman*, 30 BRBS at 42.

In the instant case, the administrative law judge found that claimant cannot return to his usual work and that employer provided claimant a suitable light duty job at its facility. He summarily found, however, that there is no basis for an award of partial disability benefits because employer had available work within claimant's restrictions at his full pre-injury wage, and claimant could have continued in that employment but for his discharge. Claimant testified that he performed light duty work within his restrictions at the MRA Shop, and that he continues to be unable to perform welding, his usual employment, without considerable pain. Documentary evidence in the record reveals that claimant was paid partial disability benefits during his employment in the MRA Shop,² EX 1, and claimant's discharge would not affect

²Claimant testified that he thought the payments were for a loss of overtime. Tr. at 49. Moreover, in this regard the administrative law judge considered a document which was never formally admitted into evidence at the hearing but simply attached by claimant to his post-hearing brief. On remand, the administrative law judge must address whether the document should be formally admitted into the record, providing employer an opportunity to respond, if it is admitted.

his entitlement to these benefits if the evidence establishes that claimant's actual post-injury wages do not reflect his post-injury wage-earning capacity. *Mangaliman*, 30 BRBS at 44. There also is evidence of record concerning jobs claimant held after his discharge, which is relevant to the inquiry into claimant's post-injury wage-earning capacity. *Id.*; EX 18. Consequently, we vacate the administrative law judge's finding that claimant is not entitled to disability benefits after his discharge, and we remand the case for the administrative law judge to consider all evidence relevant to claimant's post-injury wage-earning capacity, including the fact that employer paid claimant partial disability benefits prior to his discharge and claimant's post-injury jobs on the open market. *Mangaliman*, 30 BRBS at 43-44; *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

Accordingly, the administrative law judge's denial of partial disability benefits is vacated, and the case is remanded for further consideration consistent with this decision.³ In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³If claimant is awarded benefits for a permanent disability for more than 104 weeks, the administrative law judge must consider any issues pertaining to employer's entitlement to relief pursuant to Section 8(f), 33 U.S.C. §908(f).