BRB No. 02-0215

GARNZIE WEST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 18, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. McBeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for employer.

Whitney R. Given (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-0005) of Administrative Law

Judge Fletcher E. Campbell, 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, a heat treater, injured his back on January 7, 1993, in the course of his employment. He underwent two operations on his back, but due to continuing back pain, claimant's treating physician, Dr. Kirven, prescribed epidural injections, which were administered by Dr. Bragg in November 1998, September 1999, and June 2000. At the time of the procedure on June 7, 2000, claimant asked Dr. Bragg to inform the shipyard how long he would be off from work for recovery. Claimant scheduled a follow-up visit on June 16, 2000, and called employer's message machine on the days following the June 7 procedure to notify employer that he was at home recovering. When the shipyard had not heard from Dr. Bragg regarding the projected date claimant would return to work, Sarah Bradby, employer's workers' compensation case manager at the time, telephoned Dr. Bragg's office and was told that claimant could return to work on June 12, 2000.[1] H. Tr. at 70-71. Claimant was examined by Dr. Bragg at his follow-up visit on June 16, 2000, at which time she provided him with a note releasing him for work on June 19, 2000. Emp. Ex. 3(c). Claimant returned to work on June 19, 2000, for one day, but was subsequently terminated for failure to provide a valid excuse for his absence from June 12 to June 19, 2000, in violation of Article 15 of the union contract. Claimant filed a claim under the Act, alleging that he was discharged in violation of Section 49 of the Act, 33 U.S.C. §948a.

In his Decision and Order, the administrative law judge found that while there was confusion concerning communications from Dr. Bragg, no animus was shown in the way employer's personnel interpreted them. Moreover, the administrative law judge found that there is no evidence of the procedures followed in other cases where an employee allegedly failed to report the duration of an absence, and thus that there is no evidence to show that claimant was treated differently from other workers under the collective bargaining agreement. Accordingly, the administrative law judge denied the claim.

[1]Dr. Bragg's secretary faxed employer a note indicating that claimant could return to work on June 12, 2000. Emp. Ex. 3(b). In addition, Dr. Bragg provided two notes on June 20, indicating that the original return date of June 12 was correct. Emp. Ex. 3(d), (e).

On appeal, claimant contends that the administrative law judge erred in finding that there was no Section 49 violation, as claimant was treated differently than if he had been out on personal sick days and animus should have been inferred by employer's actions. Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in finding that claimant was not improperly discharged in violation of Section 49 of the Act. We disagree. Section 49 of the Act 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 essence of discrimination is treating the claimant differently than other employees. *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In the instant case, claimant contends that the evidence establishes the implication that employer had a discriminatory motive in its application of the "five day call out rule." Claimant bears the burden to demonstrate discriminatory animus by employer. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). Claimant's allegations alone are insufficient to establish that employer's application of the requirement that an employee provide a valid excuse for his absence from work was applied differently in this workers' compensation case than it would have been for an employee out from work on personal sick days. A controversy arose in this case because of the confusing records and testimony of Dr. Bragg regarding the date she released claimant to return to work after the June 7 procedure. Claimant contends that employer improperly interpreted Dr. Bragg's recommendations. However, this contention relates to whether the evidence establishes that claimant was properly discharged rather than to whether claimant was discriminated against based on his filing a claim under the Act. The record contains numerous return to work forms from Dr. Bragg following the June 7 procedure, with conflicting dates indicated, as well as conflicting reports and testimony. The administrative law judge does not have the authority to adjudicate whether or not an employee was dismissed for justifiable cause according to the terms of the collective bargaining agreement. *See Holliman*, 20 BRBS at 118; *Dill v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 738 (1977). The only evidence submitted to the administrative law judge related to the question of when claimant was released for work by

Dr. Bragg, and claimant has offered no evidence that he was treated differently from other employees in like circumstances.[2] *See Manship*, 30 BRBS at 178. Thus, as claimant's termination in the instant case was in accordance with employer's established policy requiring documentation for absences, and there is no evidence of discrimination or a punitive motive for the discharge, we affirm the administrative law judge's finding that Section 49 is inapplicable as it is supported by substantial evidence. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212 (CRT)(5th Cir. 1999).

Accordingly, the Decision and Order of the administrative law judge finding that claimant's discharge was not a violation of Section 49 of the Act is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[2]In addition, we reject claimant's contention that employer's discriminatory intent is established by the evidence that employer's case manager contacted Dr. Bragg's office on June 9 to determine claimant's prospective date of return. Employer had no notice that claimant did not intend to return on that date and thus obtaining that information at that time does not establish discriminatory animus or intent, and employer's action does not support claimant's allegation that "employer tried to get the release to work date changed." Moreover, there is no provision under the Act or regulations granting employer authority to directly contact a claimant's physician, and thus Dr. Bragg's discussion with employer regarding claimant's return to work date was not due to the fact that this was a work-related injury. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).