BRB Nos. 13-0286

JOHN C. THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL SHIP REPAIR CORPORATION	)	DATE ISSUED: 12/06/2013
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Dismissal of Section 48(a) Discrimination Complaint of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Adam B. Dubin (Law Office of Neil R. Lebowitz, LLC), Columbia, Maryland, for claimant.

Eric Hemmendinger (Shawe & Rosenthal, LLP), Baltimore, Maryland, for self-insured employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Dismissal of Section 48(a) Discrimination Complaint (2012-LHC-00186) of Administrative Law Judge Richard T. Stansell-Gamm 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 July 2, 2010, did not violate Section 49 of the Act, 33 U.S.C. §948a. Claimant, who had commenced his

employment with employer as a welder on August 4, 2008, experienced low back and groin area pain while lifting an empty gas cylinder at work on June 4, 2010. Claimant visited the facility's medical clinic, was diagnosed with back and groin strains, and was advised to take time off work. Claimant remained off work through June 30, 2010, during which time he received temporary total disability benefits under the Act. CX 5; 33 U.S.C. §908(b).

Claimant returned to work on July 1, 2010, at which time claimant and employer's safety agent, Rick Rappold, engaged in a conversation regarding claimant's use of an employer-provided fire-retardant life vest; this conversation resulted in claimant's returning another employee's fire-retardant life vest and employer's becoming aware that claimant had previously been using his personal non-fire-retardant life vest rather than the vest issued to him by employer. Following this conversation, claimant was directed to report to employer's vice-president, Cary Lynch. The following day, July 2, 2010, claimant met with Cary Lynch and Mr. Rappold to discuss his use of an employer-issued life vest. At the conclusion of this meeting, Cary Lynch terminated claimant for insubordination and disrespectful conduct. *See* EX 4. Claimant subsequently requested and was allowed a meeting with employer's president, Derick Lynch; following this meeting, Derick Lynch concurred with Cary Lynch's decision to terminate claimant's employment.

In his Decision and Order, the administrative law judge discussed at length the testimony of all of the parties involved in the events which culminated in claimant's termination on July 2, 2010, and found that employer's discharge of claimant did not violate Section 49 of the Act. On appeal, claimant contends that the administrative law judge's finding in this regard is erroneous. 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 claiming or attempting to claim compensation under the Act. If the employee can show he is the victim of such discrimination, and that he is qualified to return to work, 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); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988); *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).

In this case, claimant contends the evidence of record supports the inference that employer had a discriminatory motive, because it confronted claimant regarding his use of the employer-issued life vest on his first day back after his injury, and terminated him the following day. Thus, claimant avers that employer's actions on July 1 and 2, 2010, were in retaliation for claimant's receiving workers' compensation following the June 4, 2010 incident. In this regard, claimant asserts he expressly told employer on July 2, 2010, that he would wear the employer-issued life vest, that he was never given the opportunity to comply with employer's mandatory use of that life vest, and that similarly-situated employees were not terminated by employer.

Claimant bears the burden to demonstrate a discriminatory act and animus by employer. *Manship*, 30 BRBS 175; *Raynor v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988). In his decision, the administrative law judge set forth in detail the evidence presented by the parties and, based on the testimony of Mr. Rappold and Messrs. Cary and Derick Lynch, rationally found that claimant was terminated by employer for insubordination and disrespectful conduct, specifically claimant's refusal to comply with employer's requirement that he wear an employer-issued fire-retardant life jacket. Mr. Rappold testified that, on April 19, 2010, prior to claimant's injury, claimant was discovered welding without wearing his company-issued life jacket and that, when claimant was instructed to don that life jacket he refused; as a result of this incident, claimant was issued a written citation/first warning letter. *See* EX 3. Claimant subsequently complained to employer that his employer-issued vest did not fit properly; employer immediately ordered a second vest that it issued to claimant. *See* EX 11. Sometime in mid-April 2010, claimant began using his personal non-fire-retardant vest. On July 1, 2010, when claimant returned from his injury, claimant informed Mr. Rappold that he could not wear his employer-issued vest.[1]

Claimant does not contest this sequence of events leading up to his discharge on July 2, 1020. Regarding the July 2, 2010 meetings which ended in claimant's termination, the administrative law judge rationally relied on the testimony of Messrs. Lynch that claimant continued to protest that the life vest issued to him by employer was ill-suited to his work as a welder, that he could not wear that life vest, and that he did not agree to comply with employer's requirement that he wear the employer-issued life vest while performing his duties.[2] *See generally Newport News Shipbuilding & Dry Dock Co.*

[1]Upon his return to work on July 1, 2010, Mr. Rappold approached claimant in order to retrieve another employee's vest that claimant had previously used. It was during the discussion that ensued that Mr. Rappold learned that claimant had not been using his employer-issued life vest but, rather, had been using his personal life vest which was not fire-retardant.

[2]In contrast, claimant testified that he had agreed to wear the life vest supplied to him by employer. *See* Tr. at 97-98. The administrative law judge found claimant's

v. Cherry, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, the administrative law judge found that claimant's termination on July 2, 2010 resulted from his refusal in April 2010 to wear an employer-issued life vest when instructed to do so and his actions on July 1 and 2, 2010, which indicated claimant's continued refusal to comply with employer's work requirement. Decision and Order at 36 – 37. Additionally, the administrative law judge concluded that claimant did not establish that he had been treated differently from other employees in like circumstances since Mr. Rappold testified that on at least one other occasion, employer had terminated an employee for his refusal to follow a company directive and that, unlike claimant, other employees who were directed to put on their employer-issued vests immediately did so. *Id.* at 37; Tr. at 140. Thus, the administrative law judge's finding that claimant was treated no differently than other employees is supported by substantial evidence. The administrative law judge's conclusion that claimant failed to establish a discriminatory act motivated by discrimination animus is rational, supported by substantial evidence, and in accordance with law. *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). Therefore, we affirm the administrative law judge's determination that employer's termination of claimant did not violate Section 49 of the Act.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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testimony, on several notable occasions, to be "variable, his answers argumentative, and his assertions disingenuous." Decision and Order at 20.