

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street - Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 14 May 2012

CASE NO.: 2011-LHC-0060

OWCP NO.: 14-153147

In the Matter of:

BARRY COSGROVE,
Claimant,

v.

TODD SHIPYARD CORPORATION,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION,
Carrier.

Before: Richard M. Clark
Administrative Law Judge

DECISION AND ORDER DENYING SECTION 48 CLAIM

This claim arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* The matter was referred to the Office of Administrative Law Judges from the Office of Workers' Compensation Programs on October 6, 2010.

A formal hearing occurred in Seattle, Washington, on September 13, 2011. Matthew S. Sweeting, Attorney at Law, represented Barry Cosgrove ("Claimant"). Russell Metz, Attorney at Law, represented Todd Shipyard Corporation¹ and its Carrier Signal Mutual Indemnity Association (collectively, "Employer").

At the hearing, Claimant's exhibits ("CX") 1 through 11 and Employer's exhibits ("EX") 1 through 14 were admitted into evidence. Hearing Transcript ("TR") at 13, 19, 146. On December 9, 2011, Claimant and Employer submitted simultaneous post-hearing briefs, which were marked respectively as ALJX 1 and 2, thereby closing the record.

¹ Employer Todd Shipyard Corporation was recently renamed to Vigor Shipyard. TR at 82. The change of name does not affect this decision.

For the reasons stated below, this decision denies Claimant's requested relief against Employer under Section 48(a) of the Act.

I. ISSUE IN DISPUTE

The matter presents the following disputed issue:

Did Employer violate the provisions of Section 48(a) of the Act by discriminating against Claimant, resulting in a loss of wages and requiring a statutory penalty?

II. STIPULATIONS

The parties agreed to the following stipulated facts at the hearing:

1. The Act applies to Claimant's claim.
2. At the time of injury on December 11, 2009, an employee-employer relationship existed between Claimant and Employer.
3. On December 11, 2009, Claimant suffered a work-related injury.
4. Claimant's claim was timely noticed and filed.
5. Claimant is entitled to compensation and benefits under the Act for time missed related to the December 11, 2009, injury.
6. Employer is currently not paying compensation or medical benefits to Claimant.
7. Claimant reached maximum medical improvement ("MMI") on May 3, 2010.
8. Claimant has no outstanding medical bills.
9. The nature and extent of disability is not disputed.
10. Claimant's average weekly wage ("AWW") at the time of injury was \$708.43.
11. Claimant received temporary total disability benefits from Employer from February 22, 2010, to May 3, 2010, in the amount of \$472.28 per week for 10.143 weeks amounting to a total of \$4,790.34.
12. Special Fund relief is not being sought by Employer.

TR at 5-6. The foregoing stipulations are supported by substantial evidence in the record and are accepted for all purposes. *See Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17

BRBS 142, 144 n.2 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984).

III. FACTUAL FINDINGS

Claimant's Work with Employer

1. Claimant was born on July 6, 1960. CX 1 at 1. On October 18, 2007, Claimant began working for Employer as a journeyman carpenter. TR at 53-54; EX 7 at 31. Claimant was placed on "on-call" status, laid off due to a reduction in force, and rehired multiple times, which is the normal and ordinary course of business at the shipyards. EX 7 at 31-43. On or about April 21, 2008, Claimant was temporarily promoted to leadman, a supervisory position, while the supervisor was on vacation. EX 7 at 36. After May 4, 2008, he remained in a supervisory position for the duration of his employment with Employer.² TR at 54; EX 7 at 36-43. Claimant had a work related injury on December 11, 2009, and filed a compensation claim for this injury (LS-203) on February 9, 2010. TR 58-59; CX 1 at 3.

2. Prior to the December 2009 injury, Claimant had two other work related accidents that resulted in injuries. TR at 55. Claimant's first injury was a laceration to his thumb, which he sustained while removing scaffolding with another shipwright. TR at 55-56. Employer stated that it gave Claimant a verbal warning related to his behavior that caused the injury, but Claimant did not recall receiving a reprimand. TR at 55-56, 92. Claimant's second injury occurred on October 30, 2009, when he struck and injured his left arm while removing shape blocks with a crow bar. TR at 57; EX 2 at 5. Following his second injury, an Accident Review Committee ("ARC") meeting was held on November 11, 2009. TR 57-58; EX 2 at 12. Claimant did not remember going to an ARC meeting for that injury, but instead recalls an informal meeting, and stated he did not receive a formal write-up or reprimand. TR at 57-58. Employer found that the root cause of the October 2009 accident was Claimant's lack of planning and the availability of additional tools that Claimant failed to utilize. EX 2 at 12. On November 10, 2009, Claimant signed and acknowledged the results of an investigation following his October 30, 2009, injury. EX 2 at 7-8.

December 2009 Injury and Investigation

3. On Friday, December 11, 2009, Claimant was working as lead shipwright on the United States Coast Guard Icebreaker Healy. TR at 58. At the end of the day, Claimant was asked to make a modification on the roller scaffolding stage by the propeller, also called a wheel staging. *Id.* The wheel staging needed to be moved about six inches, but its location near surrounding equipment prevented the use of forklifts or cranes to move it. TR at 59. The staging was approximately 20 feet by 20 feet, about 25 feet tall, and had 16 wheels. TR at 66.

² At the time of hearing, Claimant was off work due to a bilateral progressive knee injury caused by snapping of his knees suffered in February or March 2011. TR at 74; CX 10 at 8. The knee injury is unrelated to the December 2009 scaffolding incident. *Id.* Claimant was terminated in July 2011, though the record does not explain why. The termination is unrelated to the issues decided in this matter.

4. While moving the staging, Claimant pulled his groin area. TR at 59. Claimant did not tell anyone at the shipyard about his injury on the day of the accident because he did not realize the seriousness of his injury until he experienced a burning sensation in his groin area over the weekend. TR at 59-60. Claimant reported his injury to Employer the following Monday. TR at 60-61. Claimant went to the doctor on December 15, 2009, and learned that he had a double inguinal hernia. TR at 59; CX 3 at 21. Claimant filed an accident report on December 16, 2009, where he described that the accident involved pushing and pulling staging. CX 1 at 1. In the accident report, Claimant stated that he felt a little burning in the left groin area but first thought it was the usual aches and pains of daily work. *Id.* Claimant did not mention that the injury was a hernia, only that it affected his lower abdomen. *Id.* Claimant's December 16, 2009, accident report listed two fellow workers as witnesses on the job site at the time of injury, Manuelito Montoya and John Hoeckendorff. EX 3 at 13. At the hearing, Claimant alleged that he had multiple shipwrights and other trade individuals, over 10 and less than 15 people, helping him move the staging. TR at 59. However, in an undated document typed and prepared by Claimant after the accident, Claimant stated that he had three shipwrights and one rigger who helped him move the staging.³ CX 4 at 27. In spite of the accident, Claimant was released to modified duty on December 17, 2009. EX 9 at 50. His modified duty included restrictions on lifting and climbing, and Claimant was told to avoid maintaining a crouch/squat position. EX 9 at 50-51.

5. Kevin Fish is the assistant manager of staffing at Employer, a position he has held for three to four months of his 37 years with the company. TR at 82-83. Prior to that, and at the relevant time for this case, he was a trade coordinator at Employer and was responsible for investigating the staging/scaffolding incident involving Claimant. TR at 85; CX 7 at 5-6, 13-14. On December 16, 2009, Mr. Fish conducted a post-accident investigation of Claimant's injury by interviewing Claimant and other workers. TR at 85; EX 3 at 14. Mr. Fish spoke to all employees in the area where the accident occurred, and, according to Mr. Fish, they all said Claimant moved the staging himself, though he did not provide any specific names of the people he interviewed. TR at 85. Mr. Fish interviewed the people on the dock when the staging accident occurred even though the accident was not reported until Monday. TR at 97-98. The same people are on a project for weeks or months at a time, so these workers would have been present even if the incident were reported a few days later because the work was not a little job. TR at 97-98. Mr. Fish also spoke to Claimant after the accident, and Claimant told him that he tried to move the staging by himself. TR at 85-86. Claimant denied that he ever spoke to Mr. Fish outside of the ARC and denied telling him that he tried to move the staging by himself. TR at 59-60, 65-66. Mr. Fish was more persuasive on this point and his testimony that he spoke to Claimant about the incident is more credible than Claimant's denial of the conversation. Mr. Fish did not alter his version of any of the events in this case, whereas Claimant had better recall when it came to information that favored him, and less recall when it did not. Mr. Fish was more credible. Mr. Fish also spoke to Mr. Montoya and Mr. Hoeckendorff, but neither man could recall an incident where Claimant was moving staging. EX 3 at 13; EX 11 at 59; EX 12 at 68-69.

³ Although undated, Claimant wrote the document after the ARC meeting was held on January 13, 2010, because his shop steward Edwin Pearson advised him to prepare this document for his letter of grievance. *See* CX 4 at 27. The statement was written to detail what happened prior to and during the ARC meeting and submitted as a letter of grievance to Employer and to Robert Scott, the union service representative. TR at 63, 80.

6. Joe Hoeckendorff has worked as a carpenter or shipwright at Employer since 2006-2007. CX 8 at 5. Setting up staging is a major part of his day to day work, and when it needs to be moved, he either gathers a few guys and moves it, or calls for a fork lift to do so. CX 8 at 6-7. Claimant was his leadman in December 2009, but Mr. Hoeckendorff does not recall an incident involving moving staging when Claimant was injured. CX 8 at 8. Mr. Hoeckendorff is familiar with the ARC, which he says involves going before the “big dogs” and explaining the circumstances of an incident and trying to resolve the issue to maintain a safe and secure workplace. CX 8 at 10. He attends daily safety meetings, but doesn’t believe that his or anyone else’s job would be in jeopardy for reporting a job related injury. CX 8 at 11, 13.

7. Manuelito Montoya has worked as a carpenter at Employer for approximately two years. EX 11 at 59. At his deposition on May 4, 2011, he stated he did not know Claimant and he did not remember an incident in December 2009 where someone was injured moving staging. EX 11 at 59. When moving staging, Mr. Montoya stated that you wait until you have enough shipwrights available to move it. EX 11 at 59. He tries to always have someone with him when he has to move staging, a task that that occurs every day at work. EX 11 at 60. Mr. Montoya did not have any concerns in the workplace, and thought “everything was fine with [him], the way everything is run.” EX 11 at 60.

Accident Review Committee Meeting for December 2009 Injury

8. The ARC meeting related to Claimant’s December 2009 injury occurred on January 13, 2010. EX 3 at 16, 21. Claimant, Mr. Fish, Mr. Lynch and Gerald Edrington were among those present at the meeting. TR at 86, 105; EX 3 at 16, 21. The ARC reviewed the accident report prepared by Claimant and the investigation report prepared by Mr. Fish. TR at 78. The ARC found that Claimant failed to get help in moving the staging and failed to work safely. EX 3 at 20. The committee also considered the fact that the injury was Claimant’s second incident of a similar nature. EX 3 at 19. The committee concluded that the ARC meeting regarding the October 2009 injury failed to effectively convince Claimant that Employer was committed to having a safe and productive shipyard. EX 3 at 21. It found that the behavior of the supervisor, who sets an example for the crew, is of particular importance, and that it was unacceptable to be injured because of a failure to work in a safe manner or by making poor decisions. *Id.* The committee noted that a three-day suspension may be appropriate and recommended that the department review the process of moving staging to ensure that it was being moved appropriately. Ex 3 at 21.

9. Gerald Edrington is the ship repair operations manager at Employer, where he has worked since 1974. TR at 118; CX 6 at 5. He is currently not a union member, but was part of the boilermaker’s union until 1985. CX 6 at 7. He participated in the two ARC meetings held for the injuries Claimant suffered in October and December 2009. CX 6 at 7. According to Mr. Edrington, at the January 2010 ARC meeting the parties discussed that Claimant attempted to move the scaffolding alone during the December 2009 incident that caused Claimant’s hernia. CX 6 at 11.

10. Edwin Lynch is the resource planning group manager at Employer, a position he has held for the last four years of 37 years working at Employer. TR at 101-102; CX 9 at 5-6, 7. He is an inactive member of the pipefitter's union. CX 9 at 7. Mr. Lynch testified that Claimant's discipline had nothing to do with him requesting benefits, and his injury had nothing to do with his discipline; he was disciplined for working in an unsafe manner, not paying attention to his surroundings, and giving the impression to the people he supervised that it was acceptable to work that way. CX 9 at 12, 26. Mr. Lynch attended Claimant's January 2010 ARC meeting, but he did not have a specific recollection of the meeting. TR at 105. He believed that the meeting was not intended to admonish, humiliate or punish Claimant. TR at 105. He did, however, specifically recall meeting before the ARC with Mr. Fish and determining Claimant's punishment before the ARC meeting occurred. TR at 106. At the ARC, the original post-accident report was rejected and had to be rewritten because the committee members did not agree that the root cause had been determined and the report did not include that Claimant worked alone in the incident. TR at 114-115.

11. Edwin Pearson oversees the carpenter shop and is a member of the carpenter's union. CX 10 at 5-6. He was the chief shop steward during December 2009 and January 2010 and is familiar with Claimant and the injuries he suffered to his hand, arm, groin, and knee. CX 10 at 5, 7-8. He attended the ARC as Claimant's representative. CX 10 at 12. Mr. Pearson said Claimant agreed that he could have handled the situation that caused injury to his arm in October 2009 differently. CX 10 at 12. Mr. Pearson actually went and looked at the staging where Claimant was injured. He estimated that four people could move it, though it was a judgment call, and there was no way a forklift or crane could access the area to assist; he did not see Claimant move the staging or get injured. CX 10 at 16, 18-19.

12. Claimant attended the January 2010 ARC meeting, but he also prepared a formal written statement (CX 4, p. 27) after the ARC meeting. TR at 63. He was told by the shop steward to prepare the statement in anticipation of a grievance being filed. TR at 80. Claimant said he was not informed at the ARC meeting that they believed he moved the scaffolding himself, and he did not believe he would have been able to move it alone anyway, though he did state that others at the ARC presented his position. TR at 67, 79. It was not unsafe in his opinion to test and see if it could be moved, but otherwise the structure was 20 feet by 20 feet and 25 tall, with 16 wheels and he could not physically move it himself. TR at 66-68. Claimant described the ARC meeting as belittling and demeaning, and felt that the whole purpose was just to admonish him; he believed it was a "punishment committee," and thought that regardless of whether someone was an employee or supervisor, it would have been conducted in the same manner. TR at 68-69. Claimant stated that during the ARC meeting, Mr. Lynch commented on his "gung-ho" attitude at the shipyard when trying to get the job done. TR at 70. In a written statement prepared after the ARC meeting, Claimant wrote that Mr. Lynch raised his voice, shook the accident review form at Claimant and said, "[t]his is crap, you talk the talk but don't walk the walk." TR at 70; CX 4 at 27. He also wrote that he was told that his accident review form was a write-up and would remain in his permanent records and that the ARC committee recommended that he be suspended without pay and/or demoted, though it is not clear if he was told that occurred during the ARC meeting or after. CX 4 at 27. Claimant wrote that he became unsure of his future with the company and believed that he could never again report another injury, no matter how severe, to Employer. CX 4 at 27.

Claimant's Discipline and Suspension

13. According to Mr. Fish, Employer used progressive discipline with Claimant. He established that Claimant's first injury to his thumb resulted in a verbal warning, and Mr. Fish personally reprimanded Claimant after the first incident. TR at 94. Claimant's second injury to his left arm resulted in a written warning, and the December 11, 2009, injury was his third incident, which resulted in suspension, even though his investigative report dated January 13, 2010, stated that the December 11, 2009, accident was Claimant's second warning. TR at 91-92; EX 3 at 17. Additionally, Claimant was provided with an "Employee Unsatisfactory Performance Report" on February 1, 2010, which stated "although a first offense, the severity requires a significant suspension. Any additional violations will result in discipline, up to and including discharge." EX 3 at 15. It is, however, undisputed in the record that Claimant suffered three work related injuries, including the December 2009 injury. Claimant was suspended for three days, a decision he made after talking with Mr. Lynch and probably consulting with a direct supervisor. TR at 86-87. He was suspended because he worked in an unsafe manner, the work showed lack of planning, he did not use enough manpower to do the project, and he was the lead. TR at 88-89; CX 7 at 8, 18.

14. Claimant received notice of his three day suspension on February 1, 2010. EX 3 at 15. Claimant was cited for violating employee handbook rules 1.1, 3.1, and 3.7. *Id.* The employee handbook states that, "violations will be disciplined up to and including termination of employment." EX 13 at 76-77. Rule 1.1 states, "[e]ach employee must perform assigned work in a competent and conscientious manner." EX 13 at 76. Rule 3.1 states, "[e]mployees must conduct themselves in a safe manner at all times while on company premises." EX 13 at 77. Rule 3.7 states that any employee engaging in unsafe conduct will be disciplined up to and including termination of employment. *Id.* Final approval of the three day suspension was sent on February 4, 2010, and set the days for suspension as February 8 and 22, and March 1, 2010. CX 2 at 13-15. Claimant's suspension was one day each week, for three consecutive weeks. However, due to his leave of absence and the high work demand at that time, Claimant only served one of three suspension days. TR at 96:18-25.

Claimant's Wages

15. Employer's wage records show that Claimant continued to work full-time under modified duty until February 23, 2010, when he went out on an industrial injury leave of absence. EX 6 at 26-30; EX 9 at 50-51; CX 1 at 12. Claimant had hernia repair surgery on April 2, 2010. CX 3 at 25. After the hernia repair, Claimant returned to work on April 28, 2010, on modified duty. EX 9 at 52. He returned to work without restrictions on June 24, 2010. EX 9 at 50-56. Claimant received temporary total disability benefits from Employer from February 22 through May 3, 2010, because Employer was unable to accommodate Claimant's light duty restrictions. EX 1 at 4.

16. Claimant's personnel file shows that on June 4, 2009, Claimant was needed as "Lead I" and his pay rate of \$24.02 per hour was raised to \$25.24 per hour. CX 2 at 16. Claimant testified that upon his return to work after his December 2009 injury, Claimant was

performing lead man duties at a reduced journeyman wage. TR at 74. However, Claimant's wage records indicate that he was still receiving a base rate of \$25.24 per hour from the time of his injury in December 2009 through February 2010. EX 6 at 28-29. After filing his compensation claim on February 9, 2010, Employer's records indicate that Claimant continued receiving wages at the \$25.24 hourly rate until taking his leave of absence on February 23, 2010. *Id.* at 29. His wage rate was \$25.24 for the duration of his February 23, 2010, leave of absence and for his suspension days on February 8, February 22, and March 1, 2010. EX 2 at 12-15. Upon his return to work in May 2010, there is evidence of only one shift in the record, for which Claimant again earned \$25.24 per hour. EX 6 at 30. Claimant's detailed wage calculations for the pay period ending on December 14, 2010, showed that his pay rate was \$26.24 per hour. CX 2 at 17. There is no indication that Claimant's pay rate was reduced after his hernia injury or the filing of his compensation claim, and by December 2010, his hourly wage was, in fact, slightly higher than his pay rate prior to the hernia injury. EX 6 at 28-30; CX 2 at 17.

Claimant's Second Suspension⁴

17. After the December 2009 injury, Claimant had another incident in February or March 2011, after he returned to work as a substitute lead on the navy ship Kaiser. TR at 71; CX 10 at 8. Claimant's duties were to oversee work on the ship that day. *Id.* In the late morning, Mr. Pearson asked Claimant to send a worker to assist with a barge at the dry dock. *Id.* Claimant sent Mr. Montoya, whom Claimant was supervising at the time. *Id.* Later in the afternoon, Mr. Pearson asked if the work at the dry dock was done; Claimant checked and responded that it was not yet complete. TR at 71-72. Later that evening, another shipwright called Claimant at home to inform him that Mr. Montoya fell off the staging at the barge. TR at 72-73. Claimant stated that he had no knowledge of the staging and was not told to supervise the staging work at the barge. TR at 73. When Claimant returned to work the next day, he was suspended for a second time while the incident was investigated. *Id.* Employer stated that Claimant was responsible for ensuring that the scaffolding at the barge was in good standing and tagged correctly, a task Employer stated that Claimant failed to do. TR at 108. As a result, an employee was hurt when he used the scaffolding and it failed. TR at 108. Claimant was suspended again for three days because he was the lead and responsible for the job that injured Mr. Montoya. TR at 89-91.

Employer's Accident Review Committee

18. Angela Thompson is the workers' compensation manager at Employer, where she has worked for over 10 years. CX 5 at 5. Ms. Thompson explained that the ARC is a subcommittee of the Employer's safety committee required by the Washington State Administrative Code. CX 5 at 9. She facilitates the ARC meetings and keeps email minutes of the meetings. CX 5 at 10. According to Ms. Thompson, the purpose of the ARC is to review the accident investigations when someone is injured to identify the root cause of the accident and ensure that any safety hazards and risks have been addressed. CX 5 at 10. The ARC does not review or determine discipline, and she has no input into the discipline of employees. CX 5 at

⁴ Claimant's second suspension and subsequent termination were both mentioned in the record. However, neither party asserted that either was a discriminatory act under Section 48(a). Therefore, Claimant's second suspension and termination were not considered in the analysis.

10-11. According to Ms. Thompson, any discipline of any employee is supposed to be handled by the resource planning group before the ARC meeting occurs. CX 5 at 11. Mr. Lynch is the manager of the resource planning group, which is comprised of different trade coordinators depending on the trade of the person being disciplined. CX 5 at 11. According to Ms. Thompson, the discipline for Claimant was discussed after the ARC meeting concluded and Mr. Lynch told the ARC that Claimant would be suspended for three days. CX 5 at 11-12. The ARC is not necessarily told that a claim has been filed by someone whose injury is being discussed at the ARC. CX 5 at 12.

19. Mr. Edrington explained that the ARC is designed to review incidents and injuries to find prevent similar incidents in the future. TR at 120; CX 6 at 7-8. The ARC is used as a teaching mechanism that looks at the “root” or actual cause of what happened. TR at 120; CX 6 at 8. The person who is injured or has a work incident comes to the ARC meeting, but the questions and discussions are centered on the supervisor to find out if the employee was given the proper tools and assignment and if the proper safety rules were followed. CX 6 at 8-9. According to Mr. Edrington, generally, the ARC directs questions to supervisors and not to the employee, but in Claimant’s case, it was difficult because he was a supervisor; normally, the ARC does not talk directly to the employee, but will let them speak if they want to. TR at 123; CX 6 at 11-12, 22. At his deposition, Mr. Edrington said that overall, the ARC has been effective at reducing injuries and he has seen a downward trend in the number of injuries. CX 6 at 12-13. However, Employer strives to meet a stringent OSHA standard for injuries in the workplace, a goal that Employer has not met. TR at 121. The ARC does not decide the outcome to the individual in terms of discipline, which is handled at the trade coordinators level. TR at 124; CX 6 at 19. Mr. Edrington acknowledged that some employees have a misconception about the ARC, but once they get to the ARC, they see it is about safety issues. TR at 124; CX 6 at 20-21. Mr. Edrington has never heard of anyone saying that they will not report an injury to avoid the ARC, but he wrote an email in 2009 where he expressed concern that the ARC was not having the desired effect of reducing the number of reported injuries. TR at 127. He was adamant, however, that the Employer never attempted to reduce the number of people reporting incidents. TR at 129; CX 6 at 23.

20. According to Mr. Lynch, the purpose of the ARC is to review an accident and seek its root causes, and see what can be taken from it to teach others so the accident doesn’t happen to someone else. TR at 105; CX 9 at 11, 28. The ARC does not discipline anyone since discipline is decided by management usually before the ARC meeting. TR at 105, 108; CX 9 at 28. The focus at the ARC is on the supervisor, not on the employee. CX 9 at 11.

21. Mr. Pearson is not aware whether injuries have been reduced since the ARC started, but there was general discussion in the shipyard about whether it would be effective or not. CX 10 at 9. Management decides whether discipline is taken against an employee, not the ARC; the ARC reviews the accident report and asks questions about anything that could have been done to improve the outcome or situation. CX 10 at 20. There is no pressure from management to reduce injuries, but an emphasis is placed on safety and not being hurt. CX 10 at 25. As the shop steward, Mr. Pearson felt that there was a chilling effect on individuals reporting accidents because of the potential for repercussions, but nevertheless he always filed accident reports and it was the policy of the Employer to report any injuries. CX 10 at 26-27.

22. Philip McKenzie is the safety, health and security manager at Employer, where he has worked since November 1999. CX 11 at 5-6. He is a member of the machinist's union, and is a craft person who holds a management position at Employer. CX 10 at 6. He attended the ARC for the arm injury, but not for the December 2009 injury. CX 10 at 8. According to Mr. McKenzie, the ARC and discipline are not the same process and the ARC does not handle discipline. CX 11 at 9-11, 12. The human resources department handles discipline. CX 11 at 12. The purpose of the ARC is to determine the root cause of accidents so you can correct them and prevent future accidents. CX 11 at 9-11. According to Mr. McKenzie, there has been an attempt on the part of Employer to reduce the number of accidents over the past few years, when asked if this discouraged individuals from filing accident reports or filing claims, he responded "clearly no!" CX 11 at 19.

23. Robert Scott has been the service representative for the Pacific Northwest Regional Counsel of Carpenters for the past 25 years, and has been a member of the same union for 32 years. TR 35. He also serves as president of the Metal Trades Council. TR 35-36. At Employer, Mr. Scott represents marine carpenters and has weekly contact with management, though he meets formally with management one time per month. TR 36-37. Mr. Scott is familiar with the ARC, though he did not attend either of Claimant's ARC meetings and only attended an ARC meeting to become familiar with the process after Claimant's injuries. TR 37, 39. It was his opinion that the ARC is disciplinary in nature and that the purpose of the ARC meeting for the scaffolding incident was for discipline. TR 38. He thought the suspension was not appropriate because there had been no progressive discipline in this case, and he believed that Claimant should not have been disciplined at all since he thought it was an accident. TR at 41, 43, 49-50. He has an "impression" that there is a fear of having accidents and a choice not to report them for fear of retribution because of the ARC. TR at 44-45. However, Mr. Scott admitted that he had no knowledge of the number of injuries Claimant had at Employer, and no record of how many warnings or suspensions Claimant had before the December 2009 injury, and his union does not keep records of the number of claims filed. TR at 46. According to Mr. Scott, Claimant has filed grievances as a result of the suspension. TR at 46-47. He admitted that it was the Employer's responsibility to administer safety programs in the workplace. TR at 52.

24. Mr. Fish said that the purpose of the ARC is to make a safer workplace by lowering the number of accidents. CX 7 at 11. Any person who reports an injury appears at the ARC. CX 7 at 12-13. Disciplinary issues are not typically handled before the ARC, and the decision had been made to suspend Claimant before the ARC meeting occurred. CX 7 at 14. No one is disciplined as a result of the ARC meeting. CX 7 at 17. Employer has three levels of safety meetings: a daily meeting attended by everyone at the start of the shift, a weekly meeting attended by production superintendents and trade coordinators, and a monthly management-union meeting. CX 7 at 20-21.

25. Andrew Posewitz is the Director of Safety and the Director of Seattle Operations for Employer. TR at 131. He said the ARC was designed to attempt to explain why an incident occurred and then communicate that information the rest of the company so that it does not occur again. TR at 132. He noted that there had been no statistical change in OSHA recordable incidents since the ARC was implemented. TR at 134. Employer had 104 incidents reported at

the time of hearing in 2011, of which 63 were OSHA reportable and 17 an employee was disciplined, from a written warning up to termination. TR at 135. Supervisors were disciplined as well. TR at 136. Claimant's suspension was not overly harsh, according to Mr. Posewitz, because safety comes first, and since he was the lead, the company puts a lot of emphasis on a supervisor's responsibility when it comes to safety. TR at 135.

IV. ANALYSIS

As set forth below, the following conclusions of law are based upon an analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. § 18.57. In deciding this matter, the administrative law judge is entitled to weigh the evidence, to draw inferences from it, and to assess the credibility of witnesses. *Banks v. Chi. Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999); *see* 29 C.F.R. § 18.29.

A. Legal Analysis

1. *Prima Facie* Case and Burden of Proof

Under Section 48(a) of the Act, an employer may not discharge or discriminate against an employee because that employee has claimed or attempted to file a compensation claim against that employer. 33 U.S.C. § 948(a).⁵ There are two elements that a claimant must show to establish a *prima facie* case of discrimination under Section 48(a) of the Act. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 761 (4th Cir.1988); *Geddes v. BRB*, 735 F.2d 1412, 1415 (D.C. Cir. 1984) ("*Geddes I*"). First, the claimant must show that the employer committed a discriminatory act towards him or her. *Holliman*, 852 F.2d at 761; *Geddes I*, 735 F.2d at 1415; *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 206 (1999); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd sub nom.* 2 F.3d 64 (4th Cir. 1993); *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26, 30 (1988). Second, the claimant must demonstrate that the discriminatory act was motivated at least in part by discriminatory animus or intent on the part of the employer. *Holliman*, 852 F.2d at 761; *Geddes I*, 735 F.2d at 1415; *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104, 109 (2005); *Dunn*, 33 BRBS at 206; *Jaros*, 21 BRBS at 30.

The burden of persuasion lies with the claimant in satisfying these two *prima facie* elements of a discrimination claim. *Geddes*, 735 F.2d at 1416; *Jaros*, 21 BRBS at 30; *Martin v. Gen. Dynamics Corp.*, 9 BRBS 836, 838-39 (1978); *see Monta*, 39 BRBS at 109. In a Section 48(a) action, the claimant bears an evidentiary burden of proof that is a lesser standard than plaintiffs in civil cases. *Geddes I*, 735 F.2d at 1416-17; *Martin*, 9 BRBS at 838; *accord Grijalva v. Dir., OWCP*, 956 F.2d 274 (9th Cir. 1992) (unpublished). This lighter burden is generally consistent with the humanitarian purposes of the Act. *Geddes I*, 735 F.2d at 1417.

⁵ Although currently codified as 33 U.S.C. 948(a), this section is sometimes referred to as a "Section 49" action because it was codified as Section 49 prior to the 1984 amendments to the Act. *See, e.g., Monta v. Navy Exch. Serv. Command*, 39 BRBS 104, 109 (2005).

If the claimant satisfies the burden on the two *prima facie* elements, the burden then shifts to the employer to establish that its action was not motivated, even in part, by the claimant's exercise of his rights under the Act. *Geddes*, 735 F.2d at 1418; *Dunn*, 33 BRBS at 206. If the employer does put forth a nondiscriminatory reason for the action against the claimant, the circumstances of the action will be examined to determine whether the nondiscriminatory reason was the actual motive for its action or merely a pretext for discrimination. *Monta*, 39 BRBS at 109; *Dunn*, 33 BRBS at 206; *Brooks*, 26 BRBS at 3.

2. Discriminatory Act

To satisfy the first *prima facie* element in a Section 48 action, claimant must show that the employer committed a discriminatory act against him or her. *Monta*, 39 BRBS at 109. The essence of a discriminatory act is treating the claimant in a different manner than other like employees. *Holliman*, 852 F.2d at 761; *Dickens v. Tidewaters Stevedoring Corp.*, 656 F.2d 74, 76 (4th Cir. 1981); *Brooks*, 26 BRBS at 3; see *Tibbs v. Wash. Metro Area Transit Auth.*, 17 BRBS 92, 94 (1985). The discharge of the claimant or discriminatory pay practices can both constitute a discriminatory act if like individuals are treated differently. *Monta*, 39 BRBS at 109; see *Dickens*, 656 F.2d at 75-76.

When assessing whether there is a discriminatory act, an employer's business judgment is not a matter subject to review under Section 48(a) of the Act. *Holliman*, 852 F.2d at 761; *Leon v. Todd Shipyards Corp.*, 21 BRBS 190, 193 (1988). The Section 48 inquiry is only focused on whether the employer's policies are designed to, or have the effect of, discriminating against claimants under the Act. *Holliman*, 852 F.2d at 761 ("Proper matters for inquiry in a [Section 948(a)] 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.")

Claimant argues that the suspension imposed by Employer after reporting the scaffolding incident was a discriminatory act because the suspension served as a punishment for reporting the accident, particularly since Employer failed to identify other employees who were injured on the job and subsequently suspended. ALJX 1 at 9. Claimant essentially argues that Employer's failure to identify other like employees who were suspended after accidents shows that Claimant was treated differently after reporting his accident and thereby the victim of a discriminatory act. *Id.*

Employer argues that Claimant was not treated differently than other employees who failed to adhere to Employer's safety procedures and guidelines. ALJX 2 at 14. Employer argues that Claimant was progressively disciplined and that his first suspension occurred after his previous injuries resulted in both a verbal warning and a written warning for unsafe conduct and behavior. *Id.* Employer argues that the company's practice of progressive discipline led to Claimant's suspension. *Id.* Further, Employer argues that because all of the discipline occurred before he filed his benefits claim, Claimant cannot be the victim of cognizable discrimination under the Act.

a. Claimant's Work Suspension

Following the December 2009 incident, Claimant was given official notice of a three day suspension on February 1, 2010, after the January 13, 2010, ARC meeting had occurred. F.F. ¶ 14. Prior to the suspension, Employer conducted a full investigation of the incident, which was consistent with its policies and procedures regarding work related incidents. F.F. ¶¶ 5-7. The incident also went through an ARC review, which is consistent with the company's emphasis on safety, as all incidents and injuries do at Employer. F.F. ¶¶ 8-12. The investigation found a safety violation associated with the December 2009 accident, and Claimant's supervisors suspended him. F.F. ¶¶ 10, 13. Claimant did not demonstrate that he was treated differently than like employees by the Employer. Claimant produced no evidence regarding other employees who reported accidents and were found to have committed safety violations, and there is otherwise no evidence to find that Claimant was treated differently than other like employees. Similarly, Claimant listed the names of Mr. Hoeckendorff and Mr. Montoya as witnesses to the accident, but he never produced the name of any person who allegedly helped him move the staging, which, as the supervisor, would have been reasonable for him to do. F.F. ¶¶ 4-7. Employer followed its progressive discipline procedures, including an ARC review, and determined that Claimant's behavior warranted a suspension. There was no evidence that the discipline was motivated by anything other than sound business practices.

Claimant had prior workplace accidents with Employer and he conceded that the December 2009 injury was his third injury with Employer. F.F. ¶ 2. Claimant testified that he did not recall any warnings for his first or second injuries, but the evidence persuasively established that he received a verbal warning from Mr. Fish for the first injury and a formal warning after his second injury, including an ARC review. F.F. ¶¶ 2, 8-13. Just one month later, Claimant suffered his hernia during the December 11, 2009, scaffolding accident. F.F. ¶¶ 3, 4. The subsequent January 13, 2010, ARC meeting convened to discuss this accident found that Claimant's December 2009 injury was caused by Claimant's lack of planning and foresight at the time of the accident. F.F. ¶¶ 8-12. There is no persuasive evidence that the suspension was an example of discriminatory treatment against Claimant.

Claimant called Mr. Scott to testify as to his knowledge of ARC meetings, Claimant's ARC meeting, and Claimant's December 2009 suspension. F.F. ¶ 23. Mr. Scott testified that in his many years of experience, he had never seen an employee disciplined after an accident that resulted in injury. *Id.* He opined that Claimant was excessively disciplined and should not have been suspended. *Id.* However, Mr. Scott's testimony is not persuasive and is of little value in weighing what occurred. Although Mr. Scott testified that he is familiar with Employer's ARC meetings, he did not attend any ARC meetings until after Claimant's ARC meeting in January 2010. *Id.* Mr. Scott did not attend Claimant's ARC meeting, and only after Claimant's suspension did Mr. Scott attend an ARC meeting to familiarize himself with the process. *Id.* He had no salient information and, as a service representative for the Pacific Northwest Regional Counsel of Carpenters, has a significant bias in favor of Claimant. Mr. Scott testified that Claimant's ARC meeting was punitive, but because he did not personally attend the January 13, 2010, ARC meeting, he is not in a position to provide direct insight into the occurrences and atmosphere of that ARC meeting. *Id.* Mr. Scott only learned about the accident and ARC

meeting from Claimant and the shop steward; therefore, his testimony about the ARC meeting was punitive is not persuasive. *Id.*

Mr. Scott also testified that the disciplinary actions against Claimant were excessive. F.F. ¶¶ 23. However, Mr. Scott did not witness Claimant's December 11, 2009, accident or conduct an investigation of it. *Id.* Mr. Scott was unaware of Claimant's work history, prior injuries, or prior warnings when he opined that Claimant was excessively disciplined. *Id.* Mr. Scott testified that, based on his conversations with other employees, he believed that other employees are reluctant to report accidents for fear of retribution, but he did not have any specific evidence to substantiate this statement. *Id.* He could not illuminate any specific instances where employees were injured and subsequently disciplined, or were treated differently than Claimant by suffering injuries and not being disciplined by Employer. *Id.* For these reasons, Mr. Scott's testimony lacks credibility and is rejected. *See Williams v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 300, 303 (1981) ("Among the factors relevant to consideration of [Section 48(a) actions] are witness credibility.")

Ultimately, Claimant failed to meet his burden to establish a discriminatory act because although he felt the ARC meeting was punitive, he failed to produce any evidence that, through his suspension, he was treated differently from other similarly situated employees. *See Holliman*, 852 F.2d at 761-62 (finding no evidence of discrimination where 5-day rule justifying termination was uniformly enforced); *Dickens*, 656 F.2d at 76 (finding no discriminatory act where there was no showing of differential treatment towards claimant); *Brooks*, 26 BRBS at 4 (where evidence failed to show Claimant was treated differently than other employees who did not disclose prior injuries, his termination was not discriminatory).

Indeed, Employer's evidence is more persuasive and much more compelling than Claimant's. The evidence established that Employer places great emphasis on maintaining a safe work environment and works towards minimizing injuries in the workplace. F.F. ¶¶ 18-25. The evidence demonstrated that the ARC was a tool to examine workplace injuries and accidents in order to learn from those incidents with the goal of preventing similar evidence in the future, and that the major incidents and injuries were reviewed at the ARC. F.F. ¶¶ 18-22, 24-25. However, it is understandable how Claimant might have viewed the ARC as something other than a safety review, particularly since the notes from the January 2010 ARC meeting to address the December 2009 injury discuss and recommend that he receive a three-day suspension and Claimant was not told about the suspension until a couple weeks after the January ARC. F.F. ¶¶ 8, 12. Ms. Thompson explained that the recommended discipline for Claimant was discussed by Mr. Lynch with the ARC after the ARC meeting concluded, but it is curious that the ARC notes reflect a recommendation for suspension when the testimony was that the ARC does not mete out discipline. F.F. ¶¶ 8, 18. Reviewing the evidence provided, and comparing the explanation from Claimant and the witnesses from Employer, I am persuaded that the ARC is a safety committee designed to improve and minimize safety in the workplace and was not designed to punish employees for reporting injuries, and did not determine the punishment for Claimant in this case.

Further, there was no credible evidence that the ARC had the effect of dissuading workers from reporting work related injuries or incidents. Claimant's testimony and that of Robert Scott were insufficient to demonstrate otherwise. F.F. ¶¶ 12, 19, 23. Specifically, there is no evidence to support Claimant's contention that the ARC has a chilling effect, fabricated evidence, or was in furtherance of an unwritten and unstated policy of Employer attempting to prevent workers from reporting injuries. The tepid comment from Mr. Pearson that employees feared repercussions from reporting accidents is inconsistent with his other testimony that he believed there was no pressure from management to reduce injuries, that Employer emphasized safety, and that it was its policy to report all injuries. F.F. ¶ 21. In addition, Mr. Hoeckendorff and Mr. Montoya, both non-supervisory employees, had no issues or concerns about the ARC or reporting injuries in the workplace. F.F. ¶¶ 6-7. Mr. Scott was not credible regarding the ARC and seemed to be attempting to justify his position after the fact and without examining the underlying information available, such as how many times Claimant had been warned about his work behavior leading to injury. F.F. ¶ 23. Claimant's evidence on those points was lacking and not persuasive.

Claimant argues that Employer failed to bring forth evidence showing like individuals who were injured and subsequently disciplined. However, Claimant has the *prima facie* burden to show that Employer engaged in a discriminatory manner that treated Claimant differently than other like individuals. Claimant has not shown that he was treated differently than other individuals who reported injuries. In fact, the evidence established that he was treated the same. Claimant has produced insufficient evidence to satisfy his *prima facie* burden of showing that his suspension based upon the December 2009 incident was a discriminatory act under Section 48(a) of the Act. Even under the lesser standard of proof, there is a failure of proof from Claimant.

b. Reduction in Pay

Claimant alleges a second discriminatory act when Employer demoted him because of his compensation claim under the Act. ALJX 1 at 10. Claimant alleges that upon his return to work after his injury, he still worked as a leadman, but was technically demoted because of a reduction in pay he faced after returning to work following the December 2009 injury. *Id.* Employer argues that no such demotion occurred and argues that Claimant continued to work as a leadman with no reduction in pay for the duration of his employment. ALJX 2 at 16.

Discriminatory pay practices can constitute a discriminatory act if like individuals are treated differently. *Dickens*, 656 F.2d at 75-76 (finding no discrimination in that case). Here, however, Claimant has failed to show that his hourly pay was reduced or that his title changed after filing of his compensation claim in February 2010. F.F. ¶¶ 15, 16. In fact, the record fails to show that a reduction of Claimant's wages or a change in job title occurred at any time after his December 2009 injury or February 2010 filing of his compensation claim. F.F. ¶¶ 15-16. The record established that Claimant's leadman wage prior to injury was \$25.24 per hour. F.F. ¶ 16. Claimant was injured on December 11, 2009, and filed his compensation claim on February 9, 2010. F.F. ¶¶ 1, 3, 4. He was placed on industrial leave for hernia surgery on February 23, 2010, and returned to work on or around April 28, 2010. F.F. ¶ 15. After filing the compensation claim in February 2010, Claimant received \$25.24 per hour at work, during his leave of absence, and during one documented shift after his return to work in May 2010. F.F. ¶

16. The record established that he earned \$26.24 per hour in December 2010. *Id.* Claimant's pay rate was not reduced after filing the compensation claim, but had in fact slightly increased by December 2010. *See id.* There is no evidence demonstrating that he suffered a reduction in pay or demotion. Therefore, he has failed to show that he suffered discriminatory pay treatment after filing his compensation claim.

3. Motivated by Animus for Pursuit of Compensation

Assuming, *arguendo*, that Claimant's three day suspension constituted a discriminatory act, under the second element for a *prima facie* case, claimant would then have to show that the suspension was motivated, at least in part, by discriminatory animus or intent. *Monta*, 39 BRBS at 111; *Holliman*, 852 F.2d at 761; *Geddes I*, 735 F.2d at 1415; *Jaros*, 21 BRBS at 30. Claimant must meet this burden, *Martin*, 9 BRBS at 838-39, although this requirement is satisfied even where the employer's action was only partially motivated by the employee's efforts to seek compensation under the Act. *Geddes I*, 735 F.2d at 1415. An administrative law judge may infer animus from the circumstances surrounding the discriminatory act. *Monta*, 39 BRBS at 111; *Dunn*, 33 BRBS at 206; *Brooks*, 26 BRBS at 3; *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5, 7 (1988); *Leon*, 21 BRBS at 191. For this element of the *prima facie* case to be met, the discriminatory act must have occurred *after* the claimant's claim for compensation. *Geddes v. Dir., OWCP*, 851 F.2d 440, 443 (D.C. Cir. 1988) ("*Geddes II*").

If Claimant meets the burden of showing discriminatory animus, the burden would then shift to the employer to show that the action taken was not motivated, even in part, by Claimant's filing of the compensation claim. *Geddes I*, 735 F.2d at 1419; *Dunn*, 33 BRBS at 206; *Rayner*, 22 BRBS at 7; *Leon*, 21 BRBS at 191; *Jaros*, 21 BRBS at 30. Where the employer puts forth a nondiscriminatory reason for the action against the claimant, it will be examined to determine whether or not that reason was the actual motive, or merely pretextual. *Monta*, 39 BRBS at 109; *Dunn*, 33 BRBS at 206.

Here, Claimant argues that Employer used the ARC meeting as a punitive, disciplinary, and belittling process, where it falsely represented the nature of his accident, with the implication being that the suspension handed down after the meeting was the result of discriminatory animus towards Claimant. ALJX 1 at 9. Employer argues that the purpose of ARC meetings is to review all the facts and issues surrounding an accident, determine the root cause of the accident, and put together a training tool to educate other employees on how to avoid the same problems. ALJX 2 at 14-16. Employer argues that Claimant was progressively disciplined for failing to preplan his work and for continuing to work in an unsafe manner, not because of the ARC findings. *Id.* at 14. It also cited several employee rules which Claimant violated that warranted his suspension. F.F. ¶¶ 8-10.

In *Martin*, the ALJ found that the employer did not violate Section 948(a) where the employer dismissed claimant within one month of the date of his employment-related injury. *Martin*, 9 BRBS at 838-39. Although the reasons employer put forth for discharging claimant at the hearing were not reasons stated on the termination notice, substantial evidence supported employer's explanation that claimant was not a satisfactory employee due to poor work performance, excessive time lost from work, and due to the fact that he was physically unable to

perform the work assigned. *Id.* Similarly, here, Employer found that Claimant he had a history of work-related injuries, and the December 2009 injury was his third significant injury. F.F. ¶ 2, 13. The ARC meetings for his second and third injury both found that Claimant failed to preplan and take the proper actions during his work, which was the root cause of his injuries. F.F. ¶¶ 2, 8. The fact that Claimant suffered two injuries from the short time period of October-December 2009, and was found to have violated several employee rules during his December 2009 accident at the very least makes the three day suspension handed down by Employer after the ARC meeting reasonable under *Martin*. See *Martin*, 9 BRBS at 838-39. More importantly, Claimant's history of work-related injuries and the Employer's finding that he lacked foresight during his December 2009 injury undermines Claimant's contention that the suspension was motivated by discriminatory animus on the part of the Employer.

In *Tibbs*, the claimant sustained a shoulder injury, filed a compensation claim, and was briefly off work due to pain. *Tibbs*, 17 BRBS at 93. Subsequently, employer terminated her employment. *Id.* Claimant alleged and the administrative law judge found that employer discriminated against claimant by not reinstating her when she was able to return to work, but on appeal, the Board found that there was no discriminatory animus on the part of the employer in not reinstating claimant because of her overall record of absenteeism. *Id.* at 94. The Board denied claimant's Section 48(a) claim, finding the employer's action justified as a form of progressive discipline for Claimant's unsubstantiated absences, and where there was no alternative evidence demonstrating discriminatory animus on the part of employer. *Id.* This case is analogous to *Tibbs*. Employer used its progressive discipline procedure when evaluating the proper discipline for Claimant. F.F. ¶¶ 13-14. Under *Tibbs*, that evidence would support a finding that Employer did not act with discriminatory animus when Claimant was suspended. *Tibbs*, 17 BRBS at 94. Claimant's prior injuries lend legitimacy to the ARC findings, and suggest that the suspension was a result of Claimant's multiple workplace accidents, for which the December 11, 2009, incident was the "last in a series of events" leading to suspension. See *Tibbs*, 17 BRBS at 94. Given these circumstances, Claimant has failed to meet his burden that the suspension was motivated by discriminatory animus. See *id.*

In support of his position, Claimant highlights the witness statements from Robert Scott, Gerald Edrington, Edwin Pearson, and Edward Lynch. As stated above, Mr. Scott's testimony regarding the ARC meetings is not persuasive and is given less weight because he was not familiar with Claimant's work history, his prior injuries, or with the ARC procedure until after Claimant's dispute arose. F.F. ¶ 23. Most importantly, Mr. Scott did not attend Claimant's January 13, 2010, ARC meeting and cannot speak directly to the punitive nature of that meeting or to whether there appeared to be discriminatory animus on the part of the ARC participants against the Claimant. *Id.* Claimant additionally argues that Gerald Edrington stated that the ARC meetings were not having the ideal preventative effects. F.F. ¶ 19. However, the fact that ARC meetings were not having the intended preventative effects does not equate to discriminatory animus against the Claimant, and does not assist Claimant in meeting his *prima facie* burden. Similarly, while Edwin Pearson and Robert Scott's statements regarding the ARC meetings creating a chilling effect on employees is concerning, the statement alone is not sufficient to establish discriminatory animus of the Employer, and is not supported by the more compelling and credible evidence that there was no chilling effect. There is no indication that employees who reported accidents were treated with discriminatory animus by Employer.

Finally, while Claimant found the ARC meeting punitive and demeaning, that in itself does not satisfy his burden of showing discriminatory animus or intent. The record established that ARC meetings were commonly held to review accidents and used as a training tool to prevent similar accidents in the future. F.F. ¶¶ 18-25. There is no indication that the meeting was held for any reason other than to discuss the December 11, 2009, scaffolding accident, or that Claimant was suspended for any reason other than his history of workplace accidents and safety violations. Rather, Mr. Lynch's purported comment appears to refer to his frustration over the fact that Claimant talked about workplace safety, but had repeatedly been involved in accidents over the course of his employment with Employer. F.F. ¶¶ 12. His comment does not show Employer's acts were motivated by animus. Claimant has failed to satisfy his *prima facie* burden of showing that the discriminatory act was motivated by animus on the part of the Employer.

Even if Claimant were able to demonstrate that his suspension by Employer was a discriminatory act made with discriminatory animus or intent, there is no indication that the suspension was motivated, even in part, by Claimant's filing of the compensation claim. To be actionable, "the discrimination must have been motivated by animus against the employee *due to his pursuit of compensation under the Act.*" *Holliman*, 852 F.2d at 761 (emphasis added). Logically, for the animus to be motivated due to the claimant's pursuit of compensation under the Act, the discriminatory act must have occurred *after* the claimant's claim for compensation. *Geddes II*, 851 F.2d at 442-43. Employer argues that Claimant has not established that his suspension was the result of filing his workers' compensation claim, because the suspension was implemented prior to the filing of the compensation claim on February 9, 2010. ALJX 2 at 10. The evidence clearly established that Claimant did not file his compensation claim until after he received his three day suspension for the scaffolding accident. F.F. ¶¶ 1.

There is no evidence to show any compensation claim was made prior to Claimant's suspension date of February 1, 2010. Thus, even assuming arguendo that there was a discriminatory act and discriminatory animus against the Claimant, Claimant has failed to show that Employer's actions were motivated, even in part, by Claimant's pursuit of compensation under the Act. 33 U.S.C. § 948(a); *Holliman*, 852 F.2d at 751; *Geddes II*, 851 F.2d at 443.

V. ORDER

For the reasons stated above, IT IS ORDERED:

Claimant's request for lost wages and penalties against Employer under Section 48(a) of the Act is DENIED. Claimant's request for attorney's fees and costs is also DENIED.

A

Richard M. Clark
Administrative Law Judge

San Francisco, California