

GEORGE WIMBUSH)	
)	
Claimant-Petitioner)	
)	
v.)	
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UNIVERSAL MARITIME SERVICE)	DATE ISSUED: <u>May 25, 2005</u>
CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (2002-LHC-02676) of Administrative Law Judge Ralph A. Romano 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked on the waterfront since 1966, and he testified that he was employed as a hustler driver in 2002. As a hustler driver, claimant worked from the cab of the hustler; he testified that he frequently banged his knee as he got in and out of the cab. H. Tr. at 15-17, 59. He stated that in February and in March or April 2002 he banged his knee so hard that he had to pause from performing his duties. *Id.* at 18, 26-27. Claimant stopped working in mid-April due to non-payment of union dues. He sought

treatment for pain in his right knee, which he originally attributed to arthritis. *Id.* at 20-21. However, following a MRI taken on May 4, 2002, Dr. Rieber diagnosed claimant with a torn medial meniscus in his right knee, and he performed arthroscopic surgery to repair the tear. CX 4. Claimant has not returned to work following the surgery. Claimant filed a claim in August 2002 for “repetitive trauma” due to banging his knee on the hustler. CX 5.

In his decision, the administrative law judge found that claimant did not establish a *prima facie* case that he suffered a work-related injury. 33 U.S.C. §920(a). The administrative law judge stated that although Dr. Rieber’s notes establish the existence of a meniscal tear, he does not believe claimant’s testimony that he banged his right knee in February and March 2002 while climbing into the hustler. Therefore, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish a *prima facie* case that his knee injury was caused by repetitive banging at work. Employer responds, urging affirmance of the administrative law judge’s denial of benefits.

In order to invoke the Section 20(a) presumption linking an injury with the employment, claimant must establish a *prima facie* case by showing that he has suffered a harm and that an accident occurred or working conditions existed that could have caused the harm. 33 U.S.C. §920(a); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant’s burden to establish each element of his *prima facie* case by affirmative proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

In the present case, claimant has been diagnosed with a tear of his medial meniscus in his right knee. Therefore, as the administrative law judge properly found, there is evidence of a harm. The administrative law judge found, however, that claimant’s statements that he banged his right knee in February and March 2002 while climbing into the hustler were not credible for several reasons. First, the administrative law judge found that claimant was uncertain as to the exact dates the “specific incidents” occurred. Second, the administrative law judge disbelieved claimant’s statements that he banged his knee at work because claimant stated he thought he was suffering from arthritis in his knee. The administrative law judge also discredited claimant’s testimony concerning the banging, because he found that claimant’s testimony that he stopped working due to his pain was belied by the number of hours claimant worked before he was suspended from work due to non-payment of dues. Decision and Order at 6.

While we are mindful of the great deference owed to the administrative law judge's credibility determinations, contrary to the suggestion of our dissenting colleague, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961), an ultimate finding or inference cannot be accepted if the decision discloses that it was reached in an invalid manner. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). We must remand this case for the administrative law judge to reconsider whether claimant established the "accident" or "working conditions" element of his *prima facie* case, as some of the administrative law judge's findings indicate a misapprehension of the nature of claimant's claim. Contrary to the administrative law judge's finding, an injury need not be traceable to a definite time and place, but can occur gradually, over a period of time. *See Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Claimant alleged a repetitive trauma to his knee during the course of his employment as a hustler driver, and therefore it is not significant that claimant failed to allege a specific date of injury.¹ Moreover, the administrative law judge found claimant's credibility to be undermined because claimant originally sought treatment for what he thought was arthritis pain rather than for a work-related injury. However, there is no requirement that a claimant accurately diagnose the source of his pain prior to his being examined by a physician, and in fact, the claimant is not required to pursue a claim until he is aware of the relationship between his injury and his employment, even in the case of misdiagnosis. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Finally, the administrative law judge acknowledged that the statement of claimant's co-worker, Mr. Davis "seems to support" the existence of a work-related injury, but found that this statement is outweighed by the evidence that claimant continued to work long hours before he was suspended by the union. Decision and Order

¹ We reject our dissenting colleague's suggestion that our opinion contravenes the Supreme Court's decision in *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). We are not directing the administrative law judge to address a claim not made or to make findings regarding whether claimant's condition is "employment-bred." Rather, claimant's claim form specifically states he is making a claim for "repetitive trauma during March 2002" in which he alleged an injury to his right knee due to "banging knee on hustler." CX 5 (LS-203 Claim Form). This is the alleged accident or condition of claimant's employment that the administrative law judge is required to address. All our decision holds is that the administrative law judge cannot discredit claimant's testimony because of his failure to recount the exact days on which he banged his knee, as a "repetitive" trauma, by nature, is not necessarily traceable to a specific day.

at 6 n.8. As claimant correctly contends on appeal, the evidence of claimant's continued ability to work does not negate the existence of a work-related injury, as a claimant is entitled to necessary medical benefits for a work injury regardless of his disability status. *See, e.g., Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2^d Cir. 1991); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Therefore, as the administrative law judge provided several invalid reasons for rejecting claimant's testimony concerning working conditions that could have caused his injury, we must remand this case for reconsideration of whether claimant sustained his burden of establishing his *prima facie* case.² *See generally Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998); *Bolden*, 30 BRBS 71.

² If, on remand, the administrative law judge finds the Section 20(a) invoked, he should address whether employer presented substantial evidence to rebut the presumption, and if so, whether claimant established a causal relationship between his injury and his employment based on the record as a whole. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In the event the administrative law judge finds claimant's knee injury work-related, he should address any other issues raised by the parties.

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to vacate the administrative law judge's decision and to remand the case for reconsideration. I believe the majority's decision is erroneous in two respects: first, in vacating the administrative law judge's credibility determination without demonstrating that it is patently unreasonable, and second, in suggesting that, notwithstanding the administrative law judge's determination that the work accidents alleged had not occurred, the administrative law judge must consider whether working conditions existed which could have caused the injury. Because the administrative law judge properly determined that claimant had not established an injury within the meaning of the Act, 33 U.S.C. §902(2), his decision denying benefits should be affirmed.

The law is clear: “[c]redibility findings of an administrative law judge are entitled to great deference and therefore can be reversed only if they are ‘patently unreasonable.’” *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042, 31 BRBS 84, 89(CRT) (2^d Cir. 1997), quoting *Lennon v. Waterfront Transport*, 20 F.3d 658, 661, 28 BRBS 22, 26(CRT) (5th Cir. 1994). See *Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 35, 15 BRBS 1, 3(CRT) (4th Cir. 1982); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). At the hearing, claimant testified that he had frequently bumped his right knee while climbing in or out of the hustler at work and that he had bumped it hard once in February and again, in mid-March or “somewhere in April” 2002. H.Tr. at 17-18, 29-30; Decision and Order at 2. Generally, claimant testified that he had injured his knee during the middle of March (H.Tr. at 19, 26, 30, 43, 59), although he admitted telling Dr. Bercik that he had sustained

two work injuries in April, while getting into and out of the hustler. H. Tr. 60-61. Claimant stated that after he bumped his knee in mid-March, it hurt to the degree that he could not walk and that is why he stopped working on April 14, although he had worked over 180 hours during the prior two weeks. H. Tr. 45-46, 50, 59. He could not remember whether he had known at that time that the union had suspended him for five months, from April 13 to September 17, 2002. H. Tr. 46, 50-51, 59; Decision and Order at 3-4.

The administrative law judge found “[c]laimant’s testimony not worthy of belief,” because of his “vague and equivocal explanation as to how and when he injured his knee . . .,” considered together with employer’s evidence that the union suspended him on April 12, 2002, and he had worked a significant number of hours in the first two weeks of April. Decision and Order at 6. The majority asserts that the administrative law judge erred in discrediting claimant’s testimony in part because claimant was “very uncertain as to specific incident dates and whether he had sustained an injury or was suffering from arthritis.” Decision and Order at 6.³ The majority contends that because claimant’s claim form LS-203 Claim Form shows that he was making a claim for “repetitive trauma during March 2002,” and repetitive trauma by its nature is not necessarily traceable to a single day, the administrative law judge may not discredit claimant’s testimony for “uncertain[ty] as to specific incident dates.” Decision and Order at 6.

A fair reading of the administrative law judge’s decision, however, reveals that he was troubled by claimant’s vague and inconsistent statements relating his knee pain to his employment. The claim form which the majority cites was filed on August 8, 2002. The evolution in claimant’s thinking about the origin of his right knee pain is reflected in medical reports which predate the August claim. Claimant had complained of right knee pain to two doctors, Dr. Verdi and Dr. Reiber. Dr. Verdi’s notes dated April 8, 2002, show a history of years of right knee pain, but no history of trauma. EX 4 at 2; H.Tr. at 41. Dr. Reiber’s notes, dated April 24, 2002, show that claimant has had “four months of right knee pain.” EX 5 at 4. In a letter to claimant’s counsel dated June 14, 2002, Dr. Reiber explained that his notes had not reflected a connection between claimant’s right knee pain and his work until May 31, 2002 because claimant had not related the two until they had a discussion about possible surgical intervention, following the MRI showing a medial meniscal tear. EX 5 at 27. As employer argued to the administrative law judge, claimant complained of right knee pain to two doctors without attributing it to a work-

³ The majority misreads the administrative law judge’s decision when it states that the administrative law judge required that the injury “be traceable to a definite time and place.” The administrative law judge considered claimant’s vagueness about when the alleged work accidents occurred as one of the factors undermining his credibility. Decision and Order at 6.

related injury. Even after he belatedly associated his pain with his work, his testimony was vague and equivocal.

The administrative law judge disbelieved claimant's testimony not only because it was vague and equivocal, but also because employer's evidence persuaded the administrative law judge that claimant had not testified truthfully about his reason for stopping work on April 14, 2002. Claimant testified that he quit because his knee pain had gotten so bad. H. Tr. at 48-50. Employer showed that claimant had worked over 180 hours in the two weeks prior to quitting, an amazing number for anyone, much less someone in pain. Employer also showed that claimant had been suspended by the union from April 13, 2002 until September 17, 2002, which precluded his employment during that period. H. Tr. at 46. Claimant and the majority implicitly concede that the evidence supports the administrative law judge's determination that claimant was untruthful in testifying that he quit work in April because of his knee pain. Claimant suggests that this finding is relevant only to the issue of disability and that it is not a valid consideration in assessing his testimony regarding the work-relatedness of his injury. The law, however, supports the administrative law judge in considering that claimant's testimony regarding his reason for quitting is relevant to a determination of his credibility regarding the cause of his injury. The Third Circuit has explained:

This concept is embodied in the common jury instruction known as the "falsus in uno, falsus in omnibus" charge, which provides: "If you find that any witness testified falsely about any material fact, you may disregard all of his testimony, or you may accept such parts of it as you wish to accept and exclude such parts of it as you wish to exclude." *United States v. Rockwell*, 781 F.2d 985, 988 (3^d Cir. 1986) (emphasis omitted).

Lambert v. Blackwell, 387 F.3d 210, 256 (3d Cir. 2004).⁴ In a trial to the court, it is proper for the judge to apply this principle. See *Shahadi v. Commissioner of Internal Revenue*, 266 F.2d 495, 498 (3d Cir. 1959). In *Bennum v. Rutgers State University*, 941 F.2d 154, 178 (3d Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992), the Third Circuit reviewed a district court decision which rested on the judge's credibility determination. The circuit court observed:

The district court, not this Court, finds facts and assesses credibility. Like any factfinder, it can accept some parts of a party's evidence and reject others. It may also, like any factfinder, assess credibility in light of the

⁴ Because claimant was employed in New Jersey (EX 11), the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. 33 U.S.C. §921(c).

maxim, *falsus in uno, falsus in omnibus*. See Black's Law Dictionary, 543 (5th ed. 1979)(defined as "false in one thing, false in everything").

Id. Applying the clear error standard, the Third Circuit upheld the district court decision. *Id.* at 179.

The majority explains why it does not share the administrative law judge's skepticism about claimant's testimony, but the majority does not even attempt to show that the administrative law judge's credibility determination is clear error as it must to justify disturbing his finding. *Id.* The majority's overreaching is particularly egregious since the administrative law judge had the indisputable advantage of watching claimant testify. See *Mancia v. Director, OWCP*, 130 F.3d 579 (3d Cir. 1997). In sum, the administrative law judge assessed claimant's credibility and determined that the work accidents alleged had not occurred. He based his decision on claimant's vagueness, his demeanor and employer's evidence. Based upon this credibility determination, the administrative law judge properly held that claimant had not established a *prima facie* case.

The majority exceeds its authority when it vacates the administrative law judge's decision and remands the case for the administrative law judge to reconsider whether claimant established the "accident" or "working conditions" element of his *prima facie* case. The majority's analysis follows that of the D.C. Circuit in *Riley v. U.S. Industries*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980), which the Supreme Court expressly rejected in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).⁵ Like the administrative law judge in the case at bar, the administrative law judge in *Riley* did not believe claimant's account of a work accident which exacerbated his neck condition. The claimant in *Riley* was a sheet metal worker with a long history of arthritic neck pain. The administrative law judge denied benefits and a divided BRB affirmed his decision. The D.C. Circuit, however, vacated the Board's decision and remanded the case for reconsideration. The court held:

By focusing on the "accident" which allegedly occurred on November 19, 1975, and by requiring the claimant to prove that the accident did in fact occur, the administrative law judge denied the claimant the benefit of this presumption. The central finding, that no accident in fact occurred, is thus not responsive to the issue properly presented for resolution. The statutory presumption is not limited to the inference of a work-related incident from

⁵ It is noteworthy that the Supreme Court granted *certiorari*, even though the D.C. Circuit, like the majority, had remanded the case for further consideration consistent with its expansive view of the Section 20(a) presumption.

an injury, and neither is the scope of the employer's burden of coming forward with substantial evidence in rebuttal. Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been "employment-bred."

Riley, 627 F.2d at 459, 12 BRBS at 242.

The Supreme Court disagreed with the D.C. Circuit's interpretation of the Section 20(a) presumption and reversed the D.C. Circuit's decision. The Supreme Court held that the Section 20(a) presumption attaches only to the claim which is made and that "the statutory presumption does not require the administrative law judge to address and the employer to rebut every conceivable theory of recovery." *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 614, 14 BRBS at 633. It is undisputed in *U.S. Industries*, as in the instant case, that "working conditions" existed which could have caused the injury. The Supreme Court held that "the statutory presumption did not require [the administrative law judge] to adjudicate any claim that was not made, and the Court of Appeals erred in remanding for that purpose." *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 616, 14 BRBS at 633.

The majority similarly errs in remanding the case to determine whether "working conditions" could have caused the injury. This is simply another formulation of the D.C. Circuit's "employment-bred" standard, rejected by the Supreme Court. Likewise, the majority's insistence that a compensable "injury need not be traceable to a definite time and space . . ." echoes the D.C. Circuit's statement:

This Court has also held that an injury need not be traceable to any particular work-related incident to be compensable.

Riley, 627 F.2d at 459, 12 BRBS at 241. The High Court could not have been clearer in repudiating the D.C. Circuit's view of the Section 20(a) presumption:

The question for remand as stated by the circuit court was not whether *Riley's* "injury" stemmed from a "work-related incident," but whether it was "employment-bred." *Ibid.*

The Court of Appeals erred because it overlooked (1) the statutory language that relates the §20(a) presumption to the employee's claim, and (2) the statutory definition of the term "injury" [which arises "out of" and "in the course of" employment. 33 U.S.C. §902(2).]

U.S. Industries/Federal Sheet Metal, Inc., 455 U.S. at 612, 14 BRBS at 632. The Court concluded: the “statutory presumption is no substitute for the allegations necessary to state a prima facie case.” 455 U.S. at 616, 14 BRBS at 633.

In sum, the majority has exceeded its authority in vacating the administrative law judge’s determination that claimant failed to establish his *prima facie* case based upon the judge’s credibility determination, *see Bennum*, 941 F.2d at 179; *see also Pietrunti*, 119 F.3d at 1042, 31 BRBS 89(CRT), and the majority has disregarded the Supreme Court’s teaching in *U.S. Industries*, that the Section 20(a) presumption attaches only to the claim which is made. For these reasons I dissent from the majority’s decision.

REGINA C. McGRANERY
Administrative Appeals Judge