BRB No. 05-0696

BRUCE WEBBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KVAERNER PHILADELPHIA SHIPYARD	)	DATE ISSUED: 05/22/2006
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Ricardo A. Byron, Philadelphia, Pennsylvania, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-LHC-01741) 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, a shipfitter for employer, filed a formal claim form on October 22, 2002, alleging that he injured his hands, arms, shoulders and neck on April 17, 2002, at

10:00 p.m. when he tripped and fell while carrying heavy equipment and used his hands to break his fall. EX 5; Tr. at 13-14. Previously, claimant had filed an injury report on June 13, 2002, in which he stated that his hands, wrists and sometimes his shoulder are constantly in discomfort, and that he possibly had carpal tunnel syndrome. EX 1. A claims adjuster for employer interviewed claimant on July 31, 2002. Claimant told the adjuster that his arms and hands went numb, and pain shot across his shoulders and neck, while he was grinding and torching on April 17, 2002, at approximately 10:00 p.m. EX 2. Claimant was diagnosed with bilateral carpal tunnel syndrome, for which claimant had successful surgery in January and February 2003, and with cervical pain. Employer controverted the claim on the ground, *inter alia*, that claimant did not sustain a work-related injury.

In his Decision and Order, the administrative law judge found that claimant failed to establish that an accident occurred on April 17, 2002, and that therefore, claimant failed to establish his *prima facie* case. Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that he failed to establish his *prima facie* case, and thus erred in concluding that he is not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), of causation. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

In order to make out a *prima facie* case, claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *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. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142(1989). If these two elements are established, claimant is entitled to a presumption that his injury is work-related. 33 U.S.C. §920(a); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

The administrative law judge found that claimant did not consistently identify a fall at work as the cause of his physical complaints. In addition, despite a negative drug test, claimant entered a rehabilitation program at the urging of a union official in an attempt to preserve his job. The administrative law judge found that claimant misrepresented to employer his reasons for entering this program. As claimant did not have evidence to corroborate his claim that he fell as alleged on April 17, 2002, the administrative law judge found that this fall did not occur. In addition, the administrative law judge declined to address a claim based on general "working conditions," finding that

such a claim was not asserted by claimant. Decision and Order at 8. The administrative law judge concluded by stating that,

> Claimant clearly suffered injuries that are likely attributable to his work. . . . However, these injuries are not compensable since he alleged that they resulted from a fall that occurred on April 17, 2002, but failed to establish that such fall actually occurred.

Id. On appeal, claimant contends that the administrative law judge erred in finding that the fall did not occur, and, alternatively, in not invoking the Section 20(a) presumption by virtue of this quoted passage in which the administrative law judge stated that claimant's injuries likely are work-related.

We reject claimant's contentions of error. Claimant asserted that a definitive work accident occurred on April 17, 2002, which caused his neck, shoulder, hand and back injuries. Tr. at 13-14; EX 5. The administrative law judge found that there is no evidence other than claimant's testimony to support this assertion, and that claimant's testimony cannot be credited. The administrative law judge relied on the documentary evidence of record, noting that only one report of the injury, claimant's claim form filed on October 22, 2002, asserted a fall at work. EX 5. Claimant's notice of injury, dated June 13, 2002, did not allege the occurrence of an accident, EX 1, and the report of the claims adjuster stated that claimant alleged that his hands and arms went numb, and pain shot across his shoulders and neck, while he was grinding and torching profiles on June 17, 2002. EX 2; Tr. at 49-50. The administrative law judge also found that claimant's hearing testimony regarding the occurrence of a fall on April 17, 2002, is not credible, because of claimant's willingness to misrepresent to employer that he needed to undergo a rehabilitation program, in an attempt to keep his job, even though he was not using drugs.[1] *See* Tr. at 27-29, 38-39.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Based on the lack of consistent documentary evidence of record, and the administrative law judge's rational rejection of claimant's testimony concerning the occurrence of the

[1] Claimant's drug tests were negative. CX 4W at 39.

work accident, we affirm the administrative law judge's finding that claimant did not establish the occurrence of a fall at work on April 17, 2002, that could have caused his physical complaints. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). To the extent that claimant seeks re-weighing of the evidence, such is beyond the Board's scope of review. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

Moreover, the administrative law judge was not required to invoke the Section 20(a) presumption merely because the record contains medical evidence that claimant has a condition likely related to his employment. In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the Supreme Court held that the Section 20(a) presumption attaches only to a claim made by the claimant, and that the administrative law judge is not required to address and an employer is not required to rebut every conceivable theory of recovery. Thus, where the claimant alleged that he was injured at work while lifting and the administrative law judge found that this incident did not occur, the Supreme Court held that the Court of Appeals erred in addressing whether a neck injury claimant sustained at home was "employment-bred." *Id.*, 455 U.S. at 614-615, 14 BRBS at 632. In this case, the administrative law judge properly found that claimant's claim was based only on the occurrence of a fall at work on April 17, 2002. Decision and Order at 8; Tr. at 13-14; EX 5. Having found that this fall did not occur, the administrative law judge properly denied benefits as claimant failed to establish an essential element of his *prima facie* case. *U.S.* Industries, 455 U.S. at 616, 14 BRBS at 633. As claimant did not allege any other work-related mechanism for his injuries, the administrative law judge was not required to address a claim that was not made merely because some medical reports attribute claimant's injuries to work. *See Brown*, 22 BRBS at 286 n.2. Thus, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's denial of benefits. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge