BRB No. 07-0914

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| R.H. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SEA RAY BOATS, INCORPORATED | ) | DATE ISSUED: 05/28/2008 |
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| and | ) | |
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| ZURICH AMERICAN INSURANCE COMPANY | ) | |
| | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Saxe, P.A.), Titusville, Florida, for claimant.

Michael F. Wilkes (Wilkes & Hedrick, P.A.), Melbourne, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-00645) of Administrative Law Judge Stuart A. Levin 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 for employer as a boat builder. Claimant had a pre-existing back injury and contended he sustained an aggravation of that injury in the course of his employment. Claimant began treatment for his back in May 2005, and underwent a discectomy on November 2, 2005. Claimant was released for light duty, but did not return to work with employer as there were no light-duty positions available. However, claimant continued to work at a bowling alley, where he had been employed sporadically for almost thirty years. At the time of the hearing, claimant also was employed full-time as a maintenance man at an apartment house. He sought partial disability and medical benefits, and the authorization of Dr. Golovac as his treating physician.

In his decision, the administrative law judge found that claimant did not establish that an accident occurred at work or that working conditions existed which could have caused his back condition. Thus, as claimant failed to establish an essential element of his *prima facie* case, the administrative law judge found that claimant did not invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and he denied claimant's claim.

On appeal, claimant contends the evidence establishes working conditions and specific accidents in the course of his employment which could have aggravated his back condition. Employer responds, urging affirmance of the administrative law judge's denial of benefits as it is supported by substantial evidence.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. 33 U.S.C. §920(a). To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *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); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, claimant contends that his current back condition is the result of three incidents that occurred in the course of his employment, as well as job duties that required bending, lifting and stooping. Specifically, claimant contends that he was walking across the plant floor on April 28, 2005, when he felt something catch in his back; that he injured his back while lifting doors for the construction of a vessel; and that he aggravated his condition while cleaning out a washer and dryer while constructing a vessel. The administrative law judge extensively discussed claimant's testimony

concerning the occurrence of the incidents at work. Noting claimant's inconsistent statements regarding the etiology of his back pain, the administrative law judge found that claimant's testimony regarding the alleged incidents when he felt pain in his back while walking across the plant floor, lifting the interior doors, and cleaning the washer/dryer in the stateroom was not credible. The administrative law judge found that claimant reported different causes of his pain to different medical providers, including non-work-related causes such as loading groceries in his car or cleaning a refrigerator. On the claim for benefits and the pre-hearing statement, claimant noted that his back condition is the result of lifting heavy doors, and did not mention the other alleged incidents. Emp. Exs. 4, 17. Moreover, on May 18, 2005, claimant reported on a disability insurance form that his back condition is not work-related. Emp. Ex. 6. The administrative law judge credited the testimony of claimant's direct supervisor, who stated that claimant did not report a specific work-related incident or complain of difficulty performing his duties. Tr. at 122, 139-140. The administrative law judge also noted that claimant's supervisor testified that the doors were not installed on the vessel during the period in question, *id.* at 197-198, and that claimant's testimony that he was sent to work on another vessel was not credible. The administrative law judge noted that while claimant alleged that co-workers saw him having trouble with his job duties, he did not provide the testimony of any corroborating witnesses or complain to his doctors of pain due to general work duties.

The administrative law judge concluded that the discrepancies in claimant's accounts of the work-related incidents are not insignificant and do not fall in the "expected range" of variation. Decision and Order at n. 18. The administrative law judge thus concluded that claimant was not credible either in his testimony at the hearing or in his recitation of the incidents to his physicians. He therefore concluded that claimant failed to establish that any incidents or conditions of employment occurred that could have caused claimant's back pain, and that the Section 20(a) presumption was not invoked.

We affirm the administrative law judge's finding because it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. 359. It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, and that the Board is not empowered to reweigh 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). 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). In this case, the administrative law judge fully discussed the evidence and rationally

explained the basis for his findings. Therefore, we affirm the administrative law judge's determination that claimant failed to establish the occurrence of an accident or working conditions that could have caused his back condition. As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied.[1] *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

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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BETTY JEAN HALL
Administrative Appeals Judge

[1] We reject claimant's contention that the administrative law judge erred in requiring the parties to submit post-hearing briefs simultaneously, as the administrative law judge has great discretion in setting the time for filing post-hearing briefs and claimant has not shown an abuse of that discretion. 20 C.F.R. §702.343.