BRB No. 97-637

PHILLIP DALE WIRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Curtis Hays, Biloxi, Mississippi, for claimant.

Ronald T. Russell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2669) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a shipfitter for employer from January 30, 1990, to April 29, 1990. Claimant alleged that he injured his back on or around March 8, 1990, when he picked up a heavy tool box at work. He continued to work the rest of the day and did not seek treatment for back pain until April 29, 1990, when he was diagnosed with a large herniated disc, and referred to Dr. McCloskey for surgery, which was performed on May 18, 1990. Claimant was released for work on November 18, 1990, by Dr. McCloskey, who imposed restrictions and opined that claimant has a 15 percent permanent partial disability.

Thereafter, claimant sought benefits under the Act.

In his Decision and Order, the administrative law judge found the evidence sufficient to invoke the Section 20(a) presumption linking claimant's back injury to his work, but found that employer introduced evidence of rebuttal that was more persuasive. 33 U.S.C. §920(a). Thus, the administrative law judge found that claimant's herniated disc and subsequent surgery were not causally related to his employment, and consequently denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, and thus erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

Specifically, claimant contends on appeal that administrative law judge erred in finding rebuttal of the Section 20(a) presumption based on the inconsistencies in claimant's testimony. In order to invoke the Section 20(a) presumption, claimant must establish a harm and that an accident occurred or working conditions existed that could have caused the harm. *Brown v. I.T.T./Continental Baking Co.,* 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990). Once invoked, Section 20(a) places the burden on employer to go forward with substantial countervailing evidence rebutting the presumption that claimant's injury was caused by his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256 (1997). If employer succeeds, the presumption no longer controls and the issue of causation must be resolved based on the record as a whole. *Id.*

In the instant case, the administrative law judge found that claimant established evidence of a harm, the herniated disc, and that conditions at work could have caused the harm, specifically Dr. McCloskey's statement that lifting a tool box could have herniated the disc. Thus, the administrative law judge found the evidence sufficient to invoke the Section 20(a) presumption. However, in reviewing the evidence to determine whether rebuttal was established, the administrative law judge found that the inconsistencies raised by claimant's statements and his medical records undermines claimant's credibility and erodes claimant's contention that he injured his back while lifting a tool box at work in March 1990. The administrative law judge first noted that the emergency room treatment report does not corroborate claimant's testimony that he told the doctor about the work accident. The administrative law judge also noted that only one of the four doctors who evaluated claimant's back pain recorded an injury while lifting a tool box, and that reference came from claimant in November 1991. The administrative law judge further found that claimant signed at least two separate documents, namely employer's accident report and Dr. Wiggin's medical history questionnaire, where each asked whether an injury or accident had occurred and both responses stated that "no injury" or "no accident" had occurred. Emp. Exs. 4, 8. In addition, the administrative law judge noted that claimant did not report an accident until October 7, 1990, and did not ask employer to pay any of his medical bills at any point. Thus, the administrative law judge concluded that the only evidence that claimant experienced an injury to his back at work was claimant's own allegation, which the

administrative law judge discredited. Decision and Order at 8-9.

This type of evidence is properly weighed prior to invoking the Section 20(a) presumption, specifically in discussing the "accident" element of a *prima facie* case. *See, e.g., Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). However, as the administrative law judge reviewed all the relevant evidence of record and is entitled to make credibility determinations which may not be disturbed unless they are inherently incredible or patently unreasonable, we hold that any error in this regard is harmless. *See generally Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978) *cert. denied*, 440 U.S. 911 (1979). Claimant has identified no error in the administrative law judge's weighing of the evidence, and his findings establish that claimant did not sustain the accident alleged as the basis of his claim. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). We therefore affirm the administrative law judge's finding that claimant's herniated disc and subsequent surgery are not causally related to his employment as it is rational and supported by substantial evidence. *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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge