BRB No. 05-0505

ARNOLD FERNANDEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITALIAN SEAWAYS INTERNATIONAL	)	DATE ISSUED: 03/08/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Supplemental Decision and Order Upon Claimant's Motion for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Renee M. Smith (Walton, Lantaff, Schroeder & Carson LLP), Miami, Florida, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Supplemental Decision and Order Upon Claimant's Motion for Reconsideration (2004-LHC-01903) of Administrative Law Judge Robert D. Kaplan 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 alleges that a specific work incident occurred on a Sunday in October or November 1999, which caused his current back condition. Claimant, who worked for employer (Italian Seaways) in its warehouse during the regular workweek, performed additional work for Italian Seaways at the Port Everglades, Florida, dock on Sundays. Claimant's Sunday work at the dock entailed stamping documents and counting boxes of liquor that were delivered to the dock on pallets to verify that the pallets were complete

before they were loaded onto Costa Cruise Line cruise ships.[1] *See* Tr. at 18-20, 24, 28, 32, 35-37, 41-49, 59-62; CX 2 at 9-16, 21-22, 27-30. With respect to the activities which he was performing on the unspecified day of his alleged work-related back injury, claimant testified that at approximately 1:00 p.m., he was doing his checking job when he experienced severe back pain. Claimant further stated that he continued working because he was the only Italian Seaways employee at the dock, but that he needed to sit on the floor when he was unable to bear the pain. *See* Tr. at 20-21. Claimant testified that after subsequently informing Mr. Roldos that he was experiencing back pain, Mr. Roldos sent claimant to Dr. Ross on November 4, 1999, and an MRI taken on December 27, 1999, revealed a herniated disc.[2] CX 3.

In his Decision and Order, the administrative law judge found that claimant failed to establish that he had suffered a harm, or that a work-related accident occurred or working conditions existed on the day in question which could have caused the harm alleged. The administrative law judge therefore concluded that as claimant did not establish his *prima facie* case, he is not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that his injury is work-related. Therefore, the administrative law judge found that claimant is not entitled to disability or medical benefits for his back condition.[3] Claimant's motion for reconsideration was summarily denied by the administrative law judge.

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[1] Alexis Roldos, employer's owner, testified that only union stevedores and other union personnel were permitted to break down any pallets or to lift or move any boxes on the dock, and that his employees, who were not union members, were not permitted to touch the liquor boxes, which were shrink-wrapped on pallets, or any other cargo. *See* Tr. at 42-43, 46-47; CX 2 at 10-15, 28. Mr. Roldos further testified that his employees counted the liquor by counting the number of boxes on the top row and multiplying that number by the number of rows on the pallet. *See* Tr. at 47; CX 2 at 13-15. Claimant, on the other hand, testified that he needed to break down the pallets of liquor boxes in order to ascertain that no boxes in the middle of the pallet were missing. *See* Tr. at 18-19.

[2] Claimant testified that on the day after the alleged incident, he told Mr. Roldos and a co-worker that he hurt his back at the dock. *See* Tr. at 21-22. Mr. Roldos testified that although claimant told him that his back hurt, claimant did not report a work injury until four or five months after the alleged incident. *See* Tr. at 50-52, 57-58; CX 2 at 16-18. Mr. Roldos additionally testified that he would not have sent claimant to Dr. Ross had he been told that claimant's back pain was work-related because Dr. Ross does not accept patients with workers' compensation claims. *See* Tr. at 50; CX 2 at 17.

[3] Alternatively, the administrative law judge found that, assuming claimant had established his *prima facie* case, claimant failed to establish that he suffered any disability as a result of the injury.

On appeal, claimant contends that the administrative law judge erred in finding that claimant is not entitled to invocation of the Section 20(a) presumption and in finding that claimant is not entitled to benefits under the Act. Employer has not responded to claimant's appeal.

In order to establish his *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 U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996). 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). 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).

In the instant case, claimant asserted that his present back condition is due to a work incident which occurred at the Port Everglades dock on a Sunday in October or November 1999. In his summary of the evidence in this case, the administrative law judge provided a complete and accurate summary of claimant's testimony regarding his alleged work incident. *See* Decision and Order at 3-4. In finding that claimant failed to establish that a work-related accident occurred or that working conditions existed which could have caused his back condition, the administrative law judge found that claimant's credibility was undermined by his failure to clearly admit or deny that he had suffered a back injury prior to his employment with employer. *Id.* at 7. Moreover, the administrative law judge stated that although he found that claimant's work activities at the port included moving boxes of liquor, claimant did not testify that he was doing so at the time he claims to have experienced back pain. *Id.* at 8. The administrative law judge further found that the record contains no statement by a physician that claimant's back condition could have been caused by moving liquor boxes. *Id.*

On these facts, we affirm the administrative law judge's determination that claimant did not establish the second prong of his *prima facie* case.[4] Without any

[4] In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of a work incident which could have caused his present back condition, claimant's argument that the administrative law judge erred in finding that claimant failed to establish the harm element of his *prima facie* case is not dispositive. We note, however, that claimant clearly established the existence of a harm with evidence of his herniated disc and back pain. Contrary to the administrative law judge's finding, *see* Decision and Order at 7, claimant is not required to prove timing as

corroborating evidence, claimant's claim rests solely on his credibility. In this regard, it is noteworthy that Dr. Ross's office records reflect that during claimant's initial visit on November 4, 1999, claimant complained of severe low back pain for the past seven to ten days with no history of any fall or trauma. The form in which claimant's history was recorded indicated that claimant's back pain was an old condition and that the visit was not because of an accident. CX 3.

It is well-established that as factfinder the administrative law judge is entitled to weigh the evidence and to assess the credibility of all witnesses. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In the instant case, as the administrative law judge provided valid reasons for questioning claimant's credibility, his finding that claimant failed to establish the occurrence of the alleged work-related accident must be affirmed. As claimant failed to establish an essential element of his *prima facie* case, we affirm the denial of benefits.[5] *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *Bolden*, 30 BRBS 71.

Accordingly, the Decision and Order Denying Benefits and the Supplemental Decision and Order Upon Claimant's Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

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part of his burden of establishing the harm element. Moreover, the administrative law judge erroneously stated that the record in this case does not include the report of claimant's MRI taken on December 27, 1999, revealing a herniated disc, *see* Decision and Order at 2 n.2; this MRI report was admitted into evidence as part of CX 3. The administrative law judge's error in finding that the harm element was not established is harmless in that claimant did not meet his burden of proving the other essential element of his *prima facie* case.

[5] Because we affirm the administrative law judge's determination that claimant failed to establish his *prima facie* case, we need not consider claimant's challenge to the administrative law judge's alternative finding that claimant failed to establish any disability as a result of the alleged injury.

ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge