BRB Nos. 13-0001
and 13-0517

GARY COOPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OFFSHORE SERVICES OF ACADIANA, LLC	)	DATE ISSUED: May 21, 2014
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order, the Decision and Order on Claimant's Motion for Reconsideration, and the Decision and Order on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Gary Cooper, Rayne, Louisiana, *pro se*.

Matthew R. Richards (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order, the Decision and Order on Claimant's Motion for Reconsideration, and the Decision and Order on Remand (2011-LHC-1480) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*., as extended by the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. 1331 *et seq*. (the Act). In an appeal

by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *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 incident occurred during the course of his employment for employer as a chef on an offshore liftboat which caused his current back and neck conditions. Specifically, claimant testified that on May 29, 2010, while carrying a five gallon container of hot fry oil, he slipped on a wrench, lost his balance, and struck his head, neck and back against a metal doorframe. Tr. at 26-27; CXs 6, 7. Claimant, who did not spill any of the oil he was carrying, stated that he immediately reported the incident to the boat's captain, prepared an incident report, and called employer's office onshore. Tr. at 27-29. Claimant testified that, although he was in pain, he was instructed by employer to continue his hitch. *Id*. at 29, 59-60. Claimant did not request medical treatment at this time and continued to perform his employment duties. *Id*. at 60-61. On June 8, 2010, a medic arrived on the vessel. Although claimant did not seek out the medic, the medic observed claimant's movements, spoke with claimant, recorded claimant's complaints of back and neck pain, and instructed claimant to seek medical care upon his return to the mainland. *Id*. at 61-65; CX 12.[1] On June 10, 2010, when claimant's hitch ended, he sought medical treatment for back and neck symptoms. Claimant has not returned to work. *See* CXs 14, 15.

In contrast to claimant's testimony, Mr. Moncrief, employer's co-owner, testified that, on May 29, 2010, claimant reported a dangerous condition involving a wrench on the ground, but did not report a work injury, a need for medical treatment, or that he was unable to continue working as a chef. Tr. at 69-71. Mr. Moncrief denied that he instructed claimant to finish his hitch, and testified that it was employer's policy to remove any injured employee from any facility so that medical treatment could be obtained. *Id*. at 70-71. Mr. Moncrief testified that he first became aware on June 10, 2010, that claimant alleged that a work injury had occurred on May 29, 1010. Mr. Moncrief further stated that it was employer's policy to refer employees to one of its physicians for an examination and post-accident drug screen following a work incident and that claimant refused to comply with this policy on June 10, 2010. *Id*. at 72.

In his Decision and Order, the administrative law judge determined that claimant failed to establish the occurrence of the specific accident that he alleged is the cause of his present back and neck symptoms. Accordingly, having found that claimant failed to

[1] The medic's report is difficult to read, but it does relate claimant's recitation of an incident on May 29, 2010, involving a wrench that resulted in back pain. CX 12.

establish his prima facie case, the administrative law judge denied the claim for benefits under the Act. Claimant filed a motion for reconsideration, which the administrative law judge denied.

Claimant appealed the administrative law judge's denial of his claim for benefits to the Board. BRB No. 13-0001. Claimant subsequently advised the Board that he wished to seek modification with the Office of Administrative Law Judges. By Order dated January 14, 2013, the Board dismissed claimant's appeal, and remanded the case for modification proceedings. Following a conference call between the parties, the administrative law judge, in a Decision and Order on Remand issued July 8, 2013, denied claimant's motion for modification.

Claimant, without the benefit of counsel, appeals the administrative law judge's Decision and Order on Remand. BRB No. 13-0517. Claimant additionally sought reinstatement of his prior appeal, BRB No. 13-0001. In an Order dated September 23, 2013, the Board reinstated claimant's appeal of the administrative law judge's Decision and Order, BRB No. 13-0001, and consolidated it with BRB No. 13-0517 for purposes of decision. Employer responds to claimant's appeals, urging affirmance.

We first address claimant's challenge to the sole issue addressed by the administrative law judge in his initial Decision and Order, *i.e.*, the finding that claimant did not fall and strike his head, neck and back on a steel doorway on May 29, 2010. BRB No. 13-0001. Claimant bears 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 in order to establish a prima facie case.[2] *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see* 33 U.S.C. §920(a); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Before the administrative law judge, claimant asserted that a definitive work incident occurred on May 29, 2010, which caused his present back and neck conditions; claimant averred that he fell after stepping on a wrench, and struck his head, neck and back on a metal doorframe. The administrative law judge found that claimant is not a particularly credible witness, and he concluded that claimant failed to establish that the

[2] Although the administrative law judge set forth various medical records documenting claimant's present medical symptoms, he made no findings regarding whether claimant established the harm element of his prima facie case. *See* Decision and Order at 9-13.

specific incident occurred.[3] The administrative law judge found that claimant's testimony regarding his May 29, 2010, conversation with Mr. Moncrief, specifically that he informed Mr. Moncrief he had injured himself after falling, was in stark contrast with Mr. Moncrief's recollection of events, specifically that claimant related a "close call" involving a wrench left on the ground and claimant's denial of being injured. *See* Decision and Order at 12. The administrative law judge stated he had doubts regarding claimant's description of the alleged incident, noting that it "seems unlikely that [claimant] would have been able to strike his head, neck and back in a manner sufficiently violent to cause his alleged injuries without spilling some of the grease he was carrying." *Id.* at 13. In addressing claimant's credibility, the administrative law judge found it "curious" that while claimant testified to being in significant pain following the alleged incident, he did not seek help when a medic came onboard his vessel, nor did he seek medical treatment onshore until he had seen an attorney. Additionally, the administrative law judge found claimant's testimony denying prior back injuries and drug use to be contradicted by medical records.[4] *Id.*

We affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. 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. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *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). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently 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); *see Bolden*, 30 BRBS 71. The administrative law judge addressed the inconsistencies in claimant's statements regarding his prior medical treatment, claimant's

[3] The administrative law judge noted that claimant did not present corroborating evidence from the witnesses who he averred saw the incident. Decision and Order at 12. *See* discussion, *infra*.

[4] Claimant testified that he did not recall seeking medical treatment for back pain in December 2006, Tr. at 54-56, or that he had acknowledged the use of drugs during an emergency room visit in July 2011. Tr. at 56-57. Records from the Southwest Medical Center indicate, however, that claimant visited the emergency room on December 11, 2006 with complaints of back pain, EX 5 at 52, 56, while records from The Regional Medical Center of Acadiana dated July 9, 2011, indicate that claimant admitted to drug use the previous day. EX 5 at 8.

description of the work incident itself, and claimant's testimony regarding his activities from the date of the alleged incident through his return to the mainland on June 10, 2010, and concluded that claimant did not establish that the alleged work event occurred. On the basis of the record before us, the administrative law judge's decision to discredit claimant's testimony is rational. Accordingly, we affirm the administrative law judge's finding on the original record that the work accident did not occur as alleged. Claimant thus failed to establish an essential element of his prima facie case and the denial of benefits on the present record is therefore affirmed. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

We next address claimant's challenge to the administrative law judge's Decision and Order on Remand wherein the administrative law judge denied claimant's motion for modification. BRB No. 13-0517. Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Section 22 of the Act displaces traditional notions of finality and evinces the Act's preference for accuracy; the intent of Section 22 is to render "justice under the Act." *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *R.V.* [*Vina*] *v. Friede Goldman Halter*, 43 BRBS 22 (2009).

In his Decision and Order on Remand, the administrative law judge stated that during a conference call between the *pro se* claimant, employer's attorney, and the administrative law judge, claimant stated that he wished to call as witnesses those individuals who were present at the time of his alleged fall. *See* Decision and Order on Remand at 2. While acknowledging that it is impossible to determine without reopening the case whether or not claimant's witnesses would change his finding that claimant did not in fact fall as he described, the administrative law judge determined that justice would not be served by allowing claimant to relitigate his case, as "Section 22 is not intended to allow Claimants who lose and want to second guess their attorneys and retry the case on a pro se basis to do so under the guise of a modification for a mistake of fact." *Id.* at 3-4. Consequently, the administrative law judge denied claimant's motion for modification.

The administrative law judge's denial of claimant's motion for modification cannot be affirmed. While the administrative law judge's decision reflects his concern that Section 22 is not intended to be a backdoor for relitigating a case, recent decisions

have recognized that the Act allows accuracy to be preferred over finality. *See Island Operating Co., Inc. v. Director, OWCP*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013); *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, recently addressed this issue in *Island Operating Company*. The court, citing the decisions of the Supreme Court in *O'Keeffe*, 404 U.S. 254, and *Banks*, 390 U.S. 459, rejected the employer's contention that a mistake of fact can serve as grounds for modification only if it is based on completely new and previously unattainable evidence in order to avoid compromising judicial finality. Rather, the court concluded that both *O'Keeffe* and *Banks* clearly establish that mistakes of fact are not limited to those based on newly discovered and previously unattainable evidence. *See Island Operating Co.*, 738 F.3d at 668, 47 BRBS at 54(CRT). The court stated that employer's concerns about finality had to be addressed legislatively. *Id*.

In the present case, the administrative law judge acknowledged that claimant, during the March 13, 2013 conference call, stated that a number of witnesses were present when he allegedly fell while working for employer and that he wished to call those witnesses to testify on his behalf. *See* Decision and Order on Remand at 2. In denying claimant's claim for benefits under the Act, the sole issue the administrative law judge addressed was whether claimant established the occurrence of the specific work incident -- slipping on a wrench and striking his head, neck and back against a metal doorframe -- that resulted in his present medical symptoms. Given that the Act allows for considerations of accuracy to prevail over finality in providing for the modification process, *see Island Operating Co.*, 738 F.3d 663, 47 BRBS 51(CRT); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), and the administrative law judge's acknowledgement of the importance of the witnesses in this case to an accurate decision, it was premature of the administrative law judge to deny modification on the basis that the witnesses could have been available at the time of the hearing.[5] *See generally Vina*, 43 BRBS 22. Therefore, we vacate the administrative law judge's Decision and Order denying motion for modification and remand the case for the administrative law judge to determine whether the judgment should be modified. 33 U.S.C. §922; *see generally L.H.* [*Henderson*] *v. Kiewit Shea*, 42 BRBS 25 (2008); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

[5] In this regard, the administrative law judge acknowledged that, without actually reopening the record and hearing from claimant's witnesses, it is impossible to say whether those witnesses would have resulted in a different outcome. *See* Decision and Order on Remand at 4.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Claimant's Motion for Reconsideration are affirmed. BRB No. 13-0001. The administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further proceedings in accordance with this opinion. BRB No. 13-0517.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge