



BRB No. 15-0138

JELANI FOSTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DANOS AND CUROLE MARINE)	
CONTRACTORS)	DATE ISSUED: <u>Oct. 19, 2015</u>
)	
and)	
)	
THE GRAY INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

David L. Bateman, Baton Rouge, Louisiana, for claimant.

Kevin A. Marks and Daniel P. Sullivan (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-00419) 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, 43 U.S.C. §1301 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33

U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 3, 2013, claimant was working for employer as a production operator on an offshore platform in the Gulf of Mexico.¹ Claimant alleged that he felt a pop and immediate pain in his back when he bent over to check a switch. Claimant reported the injury to his lead operator and was flown back to shore for medical treatment. Claimant filed a claim for compensation in July 2013, and employer controverted the claim, declining to pay any benefits. EX 1. The administrative law judge found that claimant has a bodily harm in that he has a L4-5 disc bulge with degenerative changes and recess narrowing. However, he found that claimant failed to establish that the work incident occurred as alleged because there were no witnesses to the alleged incident, the medical evidence is ambiguous and based predominantly on claimant's statements, and claimant's testimony is not credible. Decision and Order at 17-19. As claimant did not establish both elements of his prima facie case, the administrative law judge denied the claim for benefits. *Id.* at 19. Claimant appeals, and employer responds, urging affirmance.

Initially, claimant contends the administrative law judge erred in requiring him to prove the elements of his prima facie case by a preponderance of the evidence and without the benefit of the statutory presumption. Decision and Order at 17, 19. We reject this contention. In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after claimant establishes a prima facie case that (1) he suffered a harm, and that (2) an accident occurred or conditions existed at work which could have caused that harm. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). The Section 20(a) presumption does not apply to aid a claimant in establishing his prima facie case. *Id.*; *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Rather, the claimant has the burden of proving the existence of an injury or harm and the occurrence of the alleged accident by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). If the claimant establishes the two elements of his prima facie case, the Section 20(a) presumption comes into play. *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 U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Thus, the administrative law judge properly stated that claimant "carries the burden to prove that [the] alleged incident occurred by a preponderance of the evidence." Decision and Order at 17; *Drake*, 795 F.2d 478, 19 BRBS 6(CRT); *Kelaita*, 13 BRBS 326.

¹ Employer is an oil and gas production services company, which provides services to major oil companies. Tr. at 164. At the time of the alleged injury, claimant was working on the Eugene Island 360 platform project that employer staffed for Chevron. *Id.* at 32-33, 165.

Claimant next asserts the administrative law judge erred in concluding that he did not establish that the work incident occurred as alleged. It is well established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and may draw inferences therefrom. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *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 must be affirmed unless they are inherently incredible or patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The Board is not entitled to reweigh the evidence and may not disregard the administrative law judge's findings on the ground that other inferences might have been more reasonable. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976).

Contrary to claimant's assertions, the administrative law judge's findings, inferences and credibility determinations are rational and supported by substantial evidence. In finding that claimant's testimony concerning the alleged incident was not credible, the administrative law judge observed that the accident was not witnessed and there are "a number of troubling inconsistencies in [c]laimant's testimony and contradictions by other reliable evidence." Decision and Order at 17. Specifically, the administrative law judge found that: (1) although claimant generally maintained that he injured his back flipping a switch, he told Dr. Harris he injured his back while he was bending over and lifting, CX 11; CX 14 at 9; (2) claimant testified that he went to the emergency room on July 4, 2013, as soon as he got out of bed, but he did not arrive at the emergency room until 7:09 pm, almost 11 hours after he called Mr. Hebert that morning, CXs 8, 18; Tr. at 54; (3) claimant's testimony was inconsistent as to whether he had a cell phone with him on July 3, 2013, and, if so, whether or not it was turned on, Tr. at 37-38, 83-84²; (4) claimant's hearing testimony about his history of automobile accidents was

² Although claimant's phone records show no voice calls were made from his phone on July 3, 2013, the administrative law judge found that claimant had access to the cell phone of his girlfriend, Ms. Brock, as claimant testified to placing calls to employer on July 4, 2013, from her phone. Further, phone records establish that Ms. Brock's phone received a call at 6:02 am, which is approximately the time claimant said he went to the conference room to rest. CX 18. The administrative law judge concluded that "Considering [c]laimant could not remember whether he had a phone or not on 3 Jul 13 and if he did, whether it was on, the phone record indicating an incoming call at approximately 6AM on 3 Jul 13 to his girlfriend's cell phone supports the theory that he may have been on the phone when Mr. Rapp overheard him." Decision and Order at 18.

inconsistent with the history he gave in his deposition, Tr. at 66-76³; (5) claimant's testimony that he called Mr. Hebert the morning of July 4, 2013, and told him that he could not work due to the pain in his back was contradicted by that of Mr. Hebert, who the administrative law judge found to be credible, Tr. at 54, 171⁴; and, (6) claimant's testimony that he was not on a cell phone the morning of the accident was contradicted by the more reliable testimony of Mr. Rapp, who testified that, on the morning of the alleged incident, he overheard claimant on a cell phone, planning to get out of work but still be paid for the July 4 holiday, Tr. at 85, 130.⁵ Decision and Order at 17, 18. The administrative law judge rationally found claimant's testimony to be unreliable in light of these inconsistencies and he declined to credit claimant's testimony that the unwitnessed incident occurred as alleged on July 3, 2013. *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). Thus, the administrative law judge rationally found that claimant did not establish an essential element of his prima facie case by a preponderance of the evidence.⁶ Consequently, we affirm the denial of benefits

³ Claimant stated in his March 26, 2014 deposition that the last motor vehicle accident he was in occurred in 2001 or 2002. However, at the hearing, claimant conceded he was involved in automobile accidents in 2004, 2007, and on March 1, 2014. Tr. at 66-76.

⁴ Mr. Hebert testified that on July 4 claimant stated over the phone that he could work, which left Mr. Hebert planning to find claimant another job because Chevron had told Mr. Hebert that it no longer needed claimant's services. Tr. at 170-174. The administrative law judge found that Mr. Hebert's testimony was consistent with his role in placing employees in jobs, and that it was corroborated by his referring claimant to Human Resources on July 8, which Mr. Hebert testified was when claimant first told Mr. Hebert that he could not work because the pain in his back was too severe. Decision and Order at 17; Tr. at 164-165, 173-174. Claimant concedes his testimony was inconsistent with that of Mr. Hebert. Cl. Br. at 10.

⁵ The administrative law judge found Mr. Rapp's testimony credible because he reported and testified consistently on numerous occasions that he recognized claimant's voice talking about his plans to get paid without working for the July 4 holiday, and because Mr. Rapp had no apparent motive to testify untruthfully. Decision and Order at 18; EX 5 at 2; EX 6 at 5, 10-12; EX 7 at 48-50; Tr. at 126, 129-130.

⁶ Although Drs. Harris and Scrantz opined that claimant's back condition was caused by the alleged incident, they conceded, and the administrative law judge found, that their opinions were premised on claimant's report that his pain started with the incident on July 3, 2013. CX 14 at 9, 15, 25; CX 15 at 7, 20, 24-25. Drs. Harris and Scrantz also stated that degenerative disc disease is not necessarily the sign of an acute

as it is supported by substantial evidence. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

injury, and it would not be unusual for somebody claimant's age to have bulging discs without any sort of injury attached to it. CX 14 at 20-21; CX 15 at 28. Thus, the administrative law judge rationally found the medical evidence is ambiguous as to whether claimant experienced the alleged incident. Decision and Order at 18; *see Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).