

CALIXTO PATERNINA	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
CADDELL DRY DOCK	)	DATE ISSUED: 04/27/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Annamarie Fortunato (Fortunato & Fortunato, PLLC), Brooklyn, New York, for claimant.

Francis M. Womack (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-00660) of Administrative Law Judge Ralph A. Romano 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 welder for various periods from 1990 to 1999. On September 27, 1999, he filed a claim alleging he suffers from an asbestos-related lung disease due to asbestos exposure at employer's facility. CX 16. Claimant sought compensation for temporary total disability, 33 U.S.C. §908(b), commencing August 2, 1999.

In his decision, the administrative law judge found that claimant failed to establish the elements that would entitle him to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his injury to his employment. The administrative law judge rejected claimant's testimony of work-related asbestos exposure, and found that claimant failed to establish that he has asbestosis. Thus, the administrative law judge denied the claim. On appeal, claimant challenges the administrative law judge's finding that he failed to establish his *prima facie* case. Employer responds, urging affirmance of the denial of benefits.

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, in order to bring the claim within the scope of Section 20(a). *Bolden v. G.A.T.X. Terminals*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *see 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 this *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 satisfied, Section 20(a) presumes, in the absence of substantial evidence to the contrary, that claimant's injury is work-related. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5<sup>th</sup> Cir. 2000).

In this case, the administrative law judge found claimant's unsupported testimony fails to establish that he was exposed to asbestos at work, as he found that claimant was not a credible witness. The administrative law judge found claimant's demeanor at trial evasive and inconsistent, and he found claimant's testimony that he worked almost exclusively for employer from 1990 to 1999 contradicted by his Social Security records, which show that claimant worked for other employers during this period. *Compare* Tr. I at 30-31 *with* CX 11. The administrative law judge also found claimant not credible because of his July 2005 conviction for extortion, and because he testified equivocally and inaccurately as to the crime of which he was convicted. EX 6; Tr. I at 38-41. Finally, the administrative law judge noted that claimant told Dr. Newman in 1999 that he never smoked, but in 2005 he told Dr. Newman that he had smoked for two years. CX 1.

Claimant does not challenge the administrative law judge's rejection of his testimony, but contends that substantial evidence independent of his testimony

establishes the necessary elements entitling him to the Section 20(a) presumption of compensability. Specifically, claimant argues that the administrative law judge erred in not discussing that employer paid \$75,000 to settle a third-party suit for an asbestos-related injury and the existence of four compensation claims alleging asbestos exposure with employer. Claimant contends this evidence establishes the existence of working conditions that could have caused his alleged asbestosis.

We reject claimant's contentions. At the second hearing on March 15, 2006, employer's president, Steve Kalil, testified that employer was one of 75 defendants in an asbestos suit involving a tugboat worker whose vessel docked two or three times at employer's facility in the 1960's and early 1970's, and that employer paid \$75,000 to settle its liability. Tr. II at 58-59. This evidence is immaterial to this claim as claimant was not employed by employer at the time the plaintiff alleged asbestos exposure at employer's facility. Additionally, claimant submitted into evidence copies of four claim forms filed under the Act by employees of employer alleging, *inter alia*, asbestos exposure. CX 19. The resolution of these claims is not in the record. The claim forms, at best, support a finding that there may have been asbestos on employer's premises from 1990 to 1999, but they do not establish that claimant was exposed to asbestos. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). For this reason, the asbestos claims, by themselves, are insufficient to establish that working conditions existed which could have caused claimant's alleged asbestosis. See *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). Thus, as the administrative law judge rationally discredited claimant's testimony, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and there is no other competent evidence of asbestos exposure, we affirm the administrative law judge's finding that claimant did not establish the working conditions element of his *prima facie* case. *Bolden*, 30 BRBS 71. As claimant failed to establish an essential element of his claim for benefits, we affirm the denial of claimant's claim.<sup>1</sup> *U. S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631.

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<sup>1</sup> As we affirm the administrative law judge's finding that claimant did not establish the working conditions element for invocation of Section 20(a), we need not address his contention that Dr. Newman's reports and testimony establish the harm element for invocation of the presumption.

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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JUDITH S. BOGGS  
Administrative Appeals Judge