BRB No. 06-0824

SCOTT DUCKWORTH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CSX CORPORATION	)	DATE ISSUED: 04/30/2007
	)	
and	)	
	)	
SEA BRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Christopher R. Schwartz, Metairie, Louisiana, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-707) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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, a crane electrician for employer, alleges that a specific work incident occurred on March 4, 2002, which caused his current back and hip conditions. Claimant testified that on the day of this alleged incident he was assigned, along with two other employees, to clean and dust employer's storage room. While performing these assigned duties, claimant stated that he attempted to move a 50 to 75 pound transformer so that he could clean behind the unit. Claimant testified that, after lifting the transformer approximately six inches to one foot off of the ground, he experienced pain in his back which forced him to drop the unit. Although his two co-workers were about seven feet

away from him when he allegedly lifted and dropped the transformer, claimant conceded that they did not witness this event since their backs were turned toward him. However, claimant opined that as the dropped transformer made a loud noise when it hit the ground, he would have expected either of these employees to have heard it fall. Claimant reported this alleged incident to employer, and he has subsequently undergone two back operations and a total hip replacement.

In his Decision and Order, the administrative law judge found that claimant was not a credible witness and that he failed to establish that the alleged work incident of March 4, 2002, occurred. Therefore, he concluded that claimant failed to establish his *prima facie* case.[1] Accordingly, the administrative law judge denied claimant's claim for disability and medical benefits.

On appeal, claimant contends that the administrative law judge erred in denying his claim for benefits under the Act. Employer has not responded to claimant's appeal.

Initially, contrary to claimant's argument on brief, establishing the existence of a harm does not entitle claimant to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. Claimant must establish an accident or an injury arising out of and in the course of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Thus, claimant must prove both that he sustained a physical injury, or harm, and that an accident occurred at work or working conditions existed which could have caused or aggravated his harm in order to establish a *prima facie* case and invoke the Section 20(a) presumption. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *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).

The administrative law judge in the instant case, denied the claim based on his finding that the March 4, 2002, work incident alleged by claimant did not occur. The administrative law judge specifically found that, due to the many inconsistencies and contradictions in claimant's testimony, his testimony was generally equivocal, ambiguous, incredible and unpersuasive. Decision and Order at 24. In contrast to claimant's testimony regarding the alleged incident, employer presented testimony from a supervisor and several co-workers. The administrative law judge initially found that Mr. Merida, claimant's watch partner, kept a daily journal in which he recorded claimant's repeated comments that he planned to fake a work-injury so as to receive workers' compensation benefits. The administrative law judge found that claimant provided no

[1] The administrative law judge noted that employer and various witnesses also discussed an alleged injury of October 25, 2001, but found no claim based on that incident. Decision and Order at 23, n. 17. In any event, he also concluded claimant did not establish an injury on that date. Decision and Order at 30.

reason for him to doubt the veracity of Mr. Merida's testimony, and rationally rejected claimant's attempts to portray his comments as reflecting concerns about safe working conditions, since claimant had never reported any unsafe conditions.

The administrative law judge specifically discredited claimant's testimony regarding the specific events which allegedly occurred in employer's storage room on March 4, 2002. The administrative law judge noted the inconsistency between claimant's hearing testimony, wherein claimant stated that he attempted to move the transformer so that he could clean behind it, and claimant's statement following the alleged incident that he attempted to move the transformer in order to place it on a shelf. The administrative law judge then found that although claimant believed that his two co-workers, who were within seven feet of him at the time of the alleged work-incident, should have heard the transformer drop to the ground, both of those employees, Mssrs. Ragas and Bergeron, testified that they did not hear such a noise.[2] Contrary to the claimant's testimony that he dropped the transformer to the ground, the administrative law judge found that employer established through the testimony of Mr. Washburn that the transformer had not been moved. Mr. Washburn, a supervisor at the time of claimant's alleged accident, testified that his investigation of the scene of the purported March 4, 2002, incident revealed that the transformer which claimant allegedly dropped to the ground was in fact placed squarely on a shelf, and that both Mr. Ragas and Mr. Bergeron, who were present in the storeroom when claimant allegedly attempted to lift the transformer, denied moving the unit to a shelf.

Having found claimant's testimony was not credible, the administrative law judge concluded that claimant failed to establish that the alleged incident on March 4, 2002, occurred.[3] We affirm the administrative law judge's finding because it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. 359. 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 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

[2] Mr. Ragas testified that, although he did not witness claimant allegedly attempting to lift the transformer, he did hear claimant exclaim "ouch" and thereafter saw claimant holding his back. The administrative law judge concluded that if Mr. Ragas were able to hear claimant utter an exclamation, it was reasonable to assume that he should have also heard the transformer hit the ground when claimant allegedly dropped it moments before. Decision and Order at 28.

[3] The administrative law judge also determined that claimant's testimony that his back was not bothering him prior to March 4, 2002, is directly contradicted by the medical evidence of record which indicates repeated treatment prior to March 2002 for complaints of back pain, and the testimony and diary entries of Mr. Merida.

Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See 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, claimant has not raised any error in the administrative law judge's credibility determinations. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the occurrence of the alleged accident. As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631.

Accordingly, the administrative law judge's Decision and Order 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