BRB No. 09-0101

G.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAVIS BOAT WORKS, INCORPORATED	)	DATE ISSUED: 08/18/2009
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order--Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order--Denying Benefits (2007-LHC-01858) of Administrative Law Judge Alan L. Bergstrom 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 laborer/forklift operator. On March 14, 2007, claimant's supervisor, Mr. Thurman, gave claimant permission to leave work around noon because he was not feeling well and there were enough employees to finish the job. Mr. Branch, claimant's assistant supervisor, drove him home. Claimant called the next day to state that he was unable to work because he had hurt his back moving furniture. Claimant never returned to work for employer. He filed a claim for disability and medical benefits alleging that his current back condition is causally related to a back injury that he sustained at work on March 14, 2007, while sliding and lifting large boat stands. Employer controverted the claim, alleging that claimant did not sustain an injury at work on March 14, 2007.

In his decision, the administrative law judge found that claimant established the harm element of his *prima facie* case, based on medical records reflecting a harm to claimant's back.[1] The administrative law judge found, however, that claimant presented insufficient evidence to establish the "accident" element of his *prima facie* case. Therefore, the administrative law judge found that the Section 20(a) presumption is not invoked, 33 U.S.C §920(a), and he denied the claim.

On appeal, claimant contends the administrative law judge erred in finding that he failed to establish that an accident occurred at work on March 14, 2007. Therefore, claimant argues that the administrative law judge erred in not affording him the benefit of the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant has the burden of establishing the existence of a harm and that a work-related accident occurred which could have caused the harm in order to establish a *prima facie* case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). 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). If claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides a presumption that his harm is related to the work accident. *Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT).

In this case, claimant asserted that a definitive incident occurred at work on March 14, 2007, in which he injured his back while performing heavy lifting. Although claimant testified on deposition that he told his supervisors that day and Ms. Hayes, in the

[1] Claimant suffers from a degenerative disc disease at L5-S1, a disc protrusion and L2-3 and L4-5, and a herniated nucleus pulposis at L4-5. CXs 1, 3, 4; EXs 1, 2.

personnel office, the next day, that he had hurt his back at work, EX 3 at 13-14, 19, the administrative law judge did not credit this testimony in view of contrary evidence. Decision and Order at 15-16. The administrative law judge relied on the hearing testimony of Ms. Hayes and the deposition testimony of Messrs. Thurman and Branch that claimant did not report an injury at work, although all were aware that claimant's back was hurting. Mr. Thurman gave claimant permission to leave work early on March 14, but stated that he did not recall claimant mentioning that he hurt his back at work. CX 5 at 8-9. Mr. Branch drove claimant home and similarly stated that claimant did not state that he had hurt himself at work that day. CX 6 at 6. Ms. Hayes specifically testified that on March 15, 2007, claimant called in to report he had hurt himself moving something at home. Tr. at 9-10. Ms. Hayes testified that claimant insisted on using his personal insurance for medical treatment despite her advice that if it was work-related he must use employer's medical providers. Tr. at 10. The emergency room records from March 15, 2007, state that claimant hurt his back moving a dresser, EX 1 at 1, and Dr. Anderson, who examined claimant on March 20 and 27, did not note that claimant had hurt himself at work. CX 1s, 2. Claimant first reported an incident at work to employer on April 2, 2007, Tr. at 13, and to Dr. McFarland on April 3, 2007. CX 3 at 1.[2]

We reject claimant's contentions of error. It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards v. Donovan*, 300 F.2d 693 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F. 2d 403 (2d Cir. 1961), and that the Board is not empowered to reweigh the evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir.1994); *Volpe v. Northeast Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In this case, the administrative law judge rationally credited the testimony of Ms. Hayes, Mr. Thurman and Mr. Branch, and the contemporaneous medical evidence over claimant's testimony in finding that an accident did not occur at work on March 14, 2007.[3] The

[2] Dr. McFarland's report states, "[Claimant] presents describing an injury that he thinks occurred at work. He states that he cannot specific (sic) any specific event that occurred at work but he says that is where he does the only lifting he does." CX 3 at 1.

[3] Although the administrative law judge did not explicitly weigh the deposition testimony of claimant's co-worker, Mr. Laban, this error is harmless. The administrative law judge discussed this deposition. CX 7; Decision and Order at 9. Mr. Laban testified that on the morning of March 14 2007, claimant was not limping when Mr. Laban picked him up for work, but was limping when he left the job site mid-morning. Mr. Laban stated that he asked claimant what had happened, and claimant told him he had hurt his back. CX 7 at 6. Mr. Laban admitted that he did not actually see any incident in which claimant hurt himself. *Id.* at 7. In view of the administrative law judge's rational

administrative law judge's finding thus is supported by substantial evidence and therefore is affirmed. As claimant failed to establish an essential element of his claim for benefits, the administrative law judge properly denied the claim. S*ee generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996).

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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reliance in part on the contemporaneous medical evidence reporting an incident at home, we need not remand this case for the administrative law judge to address this deposition.