BRB No. 12-0338

MATTHW J. HYMEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PACORINI GLOBAL SERVICES, L.L.C.	)	DATE ISSUED: 08/22/2013
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
WORKERS TEMPORARY STAFFING	)	
	)	
and	)	
	)	
DALLAS NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau and Ryan A. Jurkovic (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Alan G. Brackett, Robert N. Popich and Tyler A. Moore (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Pacorini Global Services, L.L.C. and American Longshore Mutual Association, Limited.

Stephen Backhaus and Jason A. Schmidt (Lewis & Backhaus, P.C.), Dallas, Texas, for Workers Temporary Staffing and Dallas National Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-00075) of Administrative Law Judge C. Richard Avery 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 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 alleges that a specific work incident occurred during the morning hours of May 27, 2009, while he was working under the supervision of Pacorini (hereinafter employer).[1] Specifically, claimant testified that he injured his neck, back and left shoulder when he was struck by a forklift. Claimant identified two employees who, he asserted, witnessed this incident, as well as the employee who allegedly was driving the forklift. Claimant further testified that he finished his shift and, upon leaving employer's premises, informed a foreman of the incident. On July 22, 2009, claimant filed a report of the alleged incident with employer.

In his Decision and Order, the administrative law judge found that claimant failed to establish he sustained a compensable injury. The administrative law judge found that claimant did not meet his burden of establishing that an accident actually occurred; accordingly, the administrative law judge denied claimant's claim for compensation. On appeal, claimant contends that the administrative law judge erred in weighing the evidence and concluding that claimant did not suffer a work-related injury on May 27, 2009. Employer and WTS respond, urging affirmance of the administrative law judge's decision in its entirety.

After review of the administrative law judge's Decision and Order in light of the evidence of record, we reject claimant's assertion that the administrative law judge erred. 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 establish a prima facie case. *See 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 also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). If claimant establishes his prima facie case, Section 20(a), 33 U.S.C. §920(a), of the Act provides claimant with a presumption that his

[1]Claimant was hired by Workers Temporary Staffing (WTS), a labor supplier, and was assigned to work at a facility owned and operated by Pacorini.

condition is causally related to his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In his decision, the administrative law judge stated that inasmuch as claimant complained of left shoulder, back and neck pain and testified that he was struck by a forklift while working for employer, claimant was entitled to the benefit of the Section 20(a) presumption. Decision and Order at 15. The administrative law judge, citing employer's evidence that the work incident described by claimant did not occur, then determined that employer rebutted the presumption. *Id.* at 15-17. The administrative law judge then weighed all of the relevant evidence addressing claimant's assertion that, on May 27, 2009, he was struck by a forklift while working for employer.

We affirm the administrative law judge's finding that claimant did not establish that the forklift accident actually occurred. The administrative law judge found claimant's testimony concerning the accident to be of questionable credibility. The administrative law judge found that while Mr. Kline's testimony described the alleged May 27, 2009, work incident involving a forklift, that testimony was not consistent with claimant's regarding the incident. Decision and Order at 16-17. Moreover, the administrative law judge found that claimant did not report the alleged incident to his physician two weeks later when he had an appointment for pre-existing shoulder pain; at that time, claimant reported lower pain levels than previously. *Id.* The administrative law judge further found that Mr. Hock, the employee identified by claimant and Mr. Kline as the individual driving the forklift that struck claimant, denied striking anyone with a forklift, *id.* at 5, 18; JX 37 at 38-39, 65, and that Mr. Green, an employee identified by claimant as witnessing the alleged incident, similarly testified that he did not witness an incident involving claimant. Decision and Order at 6, 18; JX 38 at 10, 14-16. The administrative law judge also examined employer's work gang and payroll sheets and found that while claimant and Mr. Kline worked the night shift on May 26-27, 2009, *see* JX 31 at 346-347, Mr. Hock and Mr. Green worked the May 26, 2009, day shift, commencing 7:00 a.m. and ending at 7 p.m.[2] *Id.* at 336-337, 340-341; *see* Decision and Order at 13. Thus, the records do not show these employees as working on the same shift as claimant at the time of the alleged incident. *See* Decision and Order at 17-18. Finally, the administrative law judge found that Mr. Vessel, the foreman to whom claimant allegedly reported the forklift incident on the morning of May 27, 2009, denied any

[2]Claimant argues that the work gang and payroll sheets are inaccurate and were not properly authenticated. However, the administrative law judge did not rest his determination on that evidence. Although the administrative law judge found that the information on the gang sheets and payroll sheets is consistent, and that claimant presented no evidence that the sheets are faulty, the administrative law judge determined that the testimony of Mr. Green and Mr. Hock, standing alone, weighed "equally with, if not more heavily than, the contradictory testimony of Mr. Kline and Claimant." Decision and Order at 18.

recollection of such a conversation with claimant.[3] Decision and Order at 7; JX 39 at 21-24, 78.

Based upon the foregoing, the administrative law judge found that claimant did not establish that a work accident occurred on May 27, 2009, as he described.[4] Decision and Order at 19. The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge fully discussed the relevant evidence concerning the alleged work incident and found that, at best, the evidence of the accident's occurrence is evenly balanced, and thus properly concluded that claimant did not met his burden of proof. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). As claimant failed to establish the occurrence of the specific accident claimed, an essential element of his prima facie case, or identify any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, the administrative law judge's denial of benefits is affirmed.[5]

[3]After reviewing Mr. Kline's statement that he unsuccessfully searched for a foreman for two hours on May 27, 2009, in order to report the incident, Mr. Vessel additionally testified that it was inconceivable that anyone could walk around the premises for two hours without finding a foreman, supervisor, or superintendent. JX 39 at 44.

[4]We note that the evidence as to whether the alleged event at work occurred ordinarily is weighed in determining whether the Section 20(a) presumption is invoked. *See Darnell v. Bell Helicopter, Inc.*, 16 BRBS 98 (1984) *aff'd sub nom. Bell Helicopter, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984); *Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981). Any error is harmless, however, as the administrative law judge ultimately weighed the relevant evidence. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

[5]Contrary to claimant's contention, the administrative law judge did not fail to discuss the opinions of Drs. O'Brien and Bartholomew. The administrative law judge found that Dr. O'Brien's opinion is insufficient to establish that the accident actually occurred because he first examined claimant over a year after the alleged incident, which made it more difficult for him to ascertain the cause of claimant's pain. Decision and Order at 18. Although claimant reported the alleged incident to Dr. Bartholomew in October 2009, Dr. Bartholomew did not give an opinion as to the occurrence of the alleged accident. The administrative law judge was entitled to find that claimant did not meet his burden of proving that the accident actually occurred as alleged.

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge