BRB No. 01-0414

PAT ELIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar, L.L.P.), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-0067) 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, a mechanic, alleges that he sustained work-related injuries to his left knee and shoulder on July 15, 1999, when he fell from a chassis on which he was working. Claimant never returned to work for employer. The administrative law judge found that claimant did not establish by a preponderance of the evidence that an accident occurred at work on July 15, 1999. Therefore, the administrative law judge found the evidence insufficient to establish claimant's *prima facie* case for invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and he denied benefits.

On appeal, claimant challenges the administrative law judge's finding that claimant did not establish the occurrence of a work accident, and the consequential finding that the Section 20(a) presumption is not invoked. Employer responds, urging affirmance.

In order to be entitled to the Section 20(a) presumption, claimant must establish his *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See Bolden v. G.A.T.X. Terminal Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71CRT) (7th Cir.1999); *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If such evidence is produced, the presumption no longer applies and the administrative law judge must weigh the competing evidence as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

The administrative law judge found that claimant failed to establish that an accident occurred as claimant alleged, implicitly discrediting claimant's version of the events of July 15, 1999. The administrative law judge based this conclusion on the following findings: no one observed an accident or witnessed any complaints of pain consistent with claimant's having fallen, co-workers testified that claimant planned to return to Florida to live, claimant failed to report the accident to employer, and claimant's foreman testified that claimant returned to his usual work after the alleged accident, contrary to claimant's testimony that he did not. Decision and Order at 3. Claimant contends that the administrative law judge mischaracterized certain evidence and failed to discuss other evidence supportive of claimant's assertion that he fell from the chassis as alleged. While the record contains support for the administrative law judge's findings, we agree with claimant that the administrative law judge's failure to discuss all the relevant evidence requires that we remand this case for him to weigh all relevant evidence.

The record supports the administrative law judge's finding that no one actually witnessed claimant fall from a chassis, *see* EX H, I, J; Tr. at 122-123, and the administrative law judge's inference, based on co-workers' testimony that claimant planned to return to Florida to live, that claimant had motive to fabricate an accident is rational. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); EX C at 23; Tr. at 79, 96, 99, 125, 181. The administrative law judge also acted within his discretion in rejecting claimant's testimony that he discussed the accident with co-workers after its occurrence. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge,

however, did not discuss the statements of claimant's co-worker, Mr. Ying, that he saw claimant sprawled on the ground near the chassis, and that he heard sounds consistent with expressions of pain coming from claimant's direction. *See* EX J, K, M at 5, 14. Nor did the administrative law judge discuss the testimony of a co-worker, Mr. Perseghin, that claimant told him on the way home on July 15, 1998, that he had hurt himself at work. Tr. at 96-99.

The record also supports the administrative law judge's finding that claimant did not *immediately* report an injury to employer, *see* EX I, but the administrative law judge did not discuss the fact that claimant called employer two days later (on a Saturday) to report the injury, *see* EX E, F.[1] Significantly, the administrative law judge did not discuss the report of the emergency room where claimant went on the evening of July 15, 1998. This report relates claimant's account of an accident occurring at work that day.[2] EX D. As the

[1]In this regard, we reject claimant's contention that because employer stipulated that it had timely notice of the injury pursuant to Section 12 of the Act, 33 U.S.C. §912, the administrative law judge was compelled to find that claimant reported the injury to employer. The administrative law judge found that claimant reported to management a minor finger cut sustained at work shortly before the alleged work accident, but did not report the alleged fall. In context, based on the evidence cited by the administrative law judge, *see* Tr. at 170, this is a finding that claimant did not *immediately* report the accident. Inasmuch as Section 12 requires notice to employer within 30 days of the injury, the administrative law judge was not required to find that compliance with Section 12 supports the conclusion that the accident occurred as alleged.

[2]Claimant also contends that the medical reports of Drs. Vaccarino, Magliato and Paul support the finding that the accident occurred as alleged. *See* EX B; CX 1, 3. These reports

administrative law judge did not discuss and weigh all evidence relevant to the issue of whether claimant established that an accident in fact occurred at work on July 15, 1998, we vacate the denial of benefits. On remand, the administrative law judge must discuss and weigh all evidence, pro and con, on the issue of whether claimant established the occurrence

---

reflect that claimant consistently reported a work injury to the physicians, but the earliest of these physicians' examinations was two months after the alleged accident.

of a work accident on July 15, 1998, and thus is entitled to invocation of the Section 20(a) presumption.[3]

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with his decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[3]Since the case is being remanded for further findings relevant to the invocation of the Section 20(a) presumption, we decline to address claimant's contention that there is no evidence of record sufficient to rebut the Section 20(a) presumption.