BRB No. 88-2725

JIMMIE STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration and Re Award of Costs of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Scott E. Stafne (Stafne, Wetzel & Doyle), Seattle, Washington, for claimant.

Thomas G. Johnson (Bauer, Moynihan and Johnson), Seattle, Washington, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration and Re Award of Costs (85-LHC-1785, 85-LHC-1786, 85-LHC-1787) of Administrative Law Judge Alexander Karst 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 if they 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 alleged that he sustained an accidental injury to his neck, shoulders and back during the course of his employment on October 3, 1984, when he was struck in the head and knocked down by a loose container. It is uncontested that prior to the alleged injury, claimant sustained work-related injuries to his neck and left shoulder in September

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

1981 and in March 1982. Dr. Mesher was claimant's treating physician for these prior injuries and

for the alleged injury on October 3, 1984. Employer voluntarily paid claimant temporary total disability compensation for various periods from October 4, 1984 to May 24, 1986, *see* 33 U.S.C. §908(b), and seventy-five weeks of advance permanent partial disability compensation. Claimant sought additional temporary total disability compensation for various periods prior to March 10, 1986, when employer had not voluntarily provided compensation, as well as a continuing award of permanent partial disability compensation.

The administrative law judge denied the claim, finding that claimant failed to establish that the alleged accident had, in fact, occurred. Although claimant's treating physician, Dr. Mesher, testified that claimant reported reinjurying his back to him on October 3, 1984 at an appointment the following day, the administrative law judge rejected this testimony based on discrepancies which existed between Dr. Mesher's handwritten and typed chart notes relating to the dates in question. The administrative law judge also noted that Dr. Mesher's October 8, 1984, Attending Physician's Supplementary Report did not support a finding that claimant had reinjured his back and shoulders on October 3, 1984, because it indicated only that claimant reinjured his neck. Finally, the administrative law judge noted that in a lengthy report dated November 16, 1984, Dr. Mesher again failed to mention the alleged October 3, 1984 injury and attributed claimant's back, neck and shoulder symptomatology to the prior work-related injuries he sustained in 1981 and 1982. Claimant's testimony was similarly discredited because of the discrepancy between his alleged detailed recitation of the work injury to Dr. Mesher on October 4, 1984, and the fact that when his attorney filled out the claim form on October 5, 1984, the next day, he indicated that claimant was unsure as to how the injury occurred. The administrative law judge further noted that the claim form failed to mention the office visit to Dr. Mesher the previous day.

Based on this evidence and claimant's and Dr. Mesher's demeanor, the administrative law judge concluded that the conflicts and disparities which existed were not due to inadvertence, sloppiness, or other guileless circumstances; rather, they represented a deliberate effort to create or alter records in support of claimant's claim. The administrative law judge also rejected the deposition testimony of Mr. Holloman, a co-worker who was allegedly an eye-witness to the accident, because his testimony, which indicated that claimant fell to the ground during the alleged incident, differed from all of the other recorded versions presented with the exception of claimant's opening argument and trial brief. The administrative law judge also found Mr. Holloman's claim that he could remember claimant's exact words more than 3 years after the alleged injury occurred to be incredulous. Although employer's counsel had not requested that costs be assessed against claimant pursuant to Section 26 of the Act, 33 U.S.C. §926, for unreasonably instituting the claim, the administrative law judge found that an award of costs was warranted in light of the extraordinary and egregious circumstances presented. Accordingly, the administrative law judge afforded employer 15 days in which to file a cost petition and afforded claimant 15 days thereafter in which to respond. Claimant's July 26, 1988, Motion to Suspend and Set Aside the administrative law judge's July 6, 1988, Decision and Order was subsequently denied by the administrative law judge, who construed the motion as an untimely request for reconsideration. Employer's petition for costs was also denied without prejudice, and employer was allowed 15 days to file an itemized petition.

On appeal, claimant challenges the administrative law judge's denial of benefits. Claimant also contends that he was prejudiced by the administrative law judge's failure to timely issue his Decision and Order within 20 days, that the administrative law judge also erred in *sua sponte* awarding costs under Section 26, and that the administrative law judge erred in finding that his reconsideration request was untimely. Employer responds, urging affirmance.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd* 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). After careful review of the record, we affirm the administrative law judge denial of benefits, as his finding that claimant failed to establish that the alleged injury occurred is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe, supra*. Claimant therefore failed to establish a *prima facie* case for invocation of the Section 20(a) presumption.

Contrary to claimant's assertions, the administrative law judge acted within his discretion in discrediting claimant's account of the incident based on his observation of claimant and Dr. Mesher and the discrepancy between claimant's alleged detailed account of the incident to Dr. Mesher and the statement made on the claim form the following day that claimant was unsure as to how the accident had occurred. Moreover, it was also not unreasonable for the administrative law judge to have questioned claimant's account of the alleged incident based on the inconsistencies between Dr. Mesher's handwritten and transcribed office notes and his failure to even mention the alleged injury in his contemporaneous October 8, 1982, and November 16, 1982, medical reports. Finally, the administrative law judge provided a rational explanation for his decision to find that Mr. Holloman's testimony was not credible.

Although claimant attempts to offer alternative explanations for the discrepancies upon which the administrative law judge relied in denying the claim, the fact that alternative explanations may exist does not, as claimant suggests, indicate that the administrative law judge's credibility determinations were 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. 913 (1979). The administrative law judge, as the trier-of-fact, is entitled to weigh the evidence. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). As claimant failed to establish any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, his finding that the injury alleged did not occur is affirmed.[1]

[1]Claimant's assertion that the administrative law judge erred by not fully inquiring into his allegation of injury because he did not order live testimony from Mr. Holloman and claimant's attorney to rebut evidence which the administrative law judge did not find credible is without merit. The administrative law judge's duty to inquire into the matter at issue does not extend to assisting

Claimant's alternative assertion that the Decision and Order should be vacated and the case remanded because it was not issued within 20 days of the hearing as is required by 20 C.F.R. §702.348 similarly must fail. The administrative law judge's delay in issuing the Decision and Order in this case was not inordinate, and claimant has failed to establish that he was prejudiced by the delay. *See Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).

We also reject claimant's assertion that the administrative law judge erred in viewing his Motion to Suspend and Set Aside the July 6, 1988 Decision and Order as an untimely motion for reconsideration. Although claimant alleges that the time period for filing this motion was extended because the administrative law judge allowed employer 15 days in which to file a cost petition and claimant 15 days in which to respond in the initial Decision and Order, we disagree. The administrative law judge's Decision and Order Denying Benefits filed on July 6, 1988, clearly contemplated that the question of costs under Section 26 would be entertained in a supplemental decision and order. Accordingly, the administrative law judge properly concluded that the 10-day time period for filing a motion for reconsideration of the Decision and Order Denying Benefits commenced as of the July 6, 1988, filing date and that claimant's motion for reconsideration filed on July 26, 1988, *i.e.*, outside the ten day period, was untimely. *See* 20 C.F.R. §802.206(b).

We agree with claimant, however, that the administrative law judge erred in determining *sua sponte* that employer was entitled to costs pursuant to Section 26 of the Act. This case arises within the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit, which recently held that the district director, the administrative law judge, and the Board have no authority to award costs under Section 26, as that section provides for an award of costs by a court. *See Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993). As *Brickner* is controlling, the administrative law judge's determination that claimant is liable for costs under Section 26 is reversed.

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claimant in establishing the credibility of his witnesses. *See generally Stark v. Washington Star Co.*, 833 F.2d 1025, 1030, 20 BRBS 40, 48 (CRT)(D.C. Cir. 1987).

Accordingly, the administrative law judge's determination that claimant is liable for costs under Section 26 is reversed. In all other respects, the Decision and Order Denying Benefits and the Order Denying Motion for Reconsideration and Re Award of Costs are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge