BRB No. 92-1452

ERNEST H. MEREE, JR. Claimant-Petitioner v. DETYENS SHIPYARDS, INCORPORATED Self-Insured Employer-Respondent	)	DATE ISSUED:________________ DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Charles H. Raley, Jr. (Cooper & Raley), Charleston, South Carolina, for claimant.

W. Jefferson Leath, Jr. (Young, Clement, Rivers & Tisdale), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-525) of Administrative Law Judge Robert S. Amery 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipfitter for employer, alleges he sustained a work-related injury on January 22, 1990 when, while jumping from one deck of a ship to another, his hand slipped and he fell approximately 10 inches, with his back and buttocks landing on a coaming.[1] Claimant testified that at the time of this incident he felt pain like a charley horse down his left side, but that he continued to work. Tr. at 13-15. On February 20, 1990, claimant officially reported the alleged incident to employer. Cl. Ex. 2. Dr. Khoury, claimant's treating physician, subsequently diagnosed a ruptured

[1] A coaming is defined as a raised curb or rim around an opening, as on a ship's deck, designed to keep out water. *Webster's II New Riverside University Dictionary* (1984).

lumbar disc at L5-S1 on the left and performed a microlumbar laminectomy and diskectomy on March 8, 1990. Cl. Ex. 8 at 5-6, exs. 2-3. Claimant returned to light duty work approximately one month later with restrictions of no bending, lifting, or stooping. Cl. Ex. 8 at ex. 5. Drs. Khoury and Gilmore agreed that claimant's condition reached maximum medical improvement on May 24, 1990, and Dr. Khoury released claimant to full work duty on March 26, 1991 with only lifting restrictions. Cl. Exs. 7, 8 at 16, 20-22. Employer paid temporary total disability benefits during various periods of time between February 26, 1990 and April 2, 1991, 33 U.S.C. §908 (b); thereafter, claimant filed a claim for permanent total, or alternatively permanent partial, disability benefits.

A hearing was held on September 26, 1991, wherein claimant and employer disputed the occurrence of a work injury and the extent of disability. The administrative law judge, in his Decision and Order, credited the testimony of employer's witnesses over that of claimant and determined there is no evidence to corroborate claimant's allegation that he injured his back in an accident at work on January 22, 1990. Accordingly, the administrative law judge denied benefits. The administrative law judge then stated that, even if there had been a work-related injury, he would not have awarded benefits because claimant failed to show that he cannot return to his usual work and failed to demonstrate a loss of wage-earning capacity. Decision and Order at 8-9.

On appeal, claimant challenges the administrative law judge's findings regarding the occurrence of an injury on January 22, 1990, and his subsequent denial of compensation. Specifically, claimant argues that he sustained a work-related injury, that he cannot perform his usual work because of his lifting restriction, and that he suffered a loss of wage-earning capacity because his light duty job is sheltered and he cannot compete in the market for a similar position. Employer responds, urging affirmance.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which applies to the issue of whether an injury is causally related to his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Before Section 20(a) is applicable, however, claimant must establish his *prima facie* case, *i.e.*, that he sustained some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In this case, it is uncontroverted that claimant suffers from a back condition. The first element of his *prima facie* case is thus not at issue. In order to invoke Section 20(a), however, claimant must establish that the alleged accident occurred.

In the instant case, the administrative law judge concluded that claimant failed to establish that a work-related accident occurred on January 22, 1990. Specifically, the administrative law judge rejected claimant's testimony regarding his alleged fall on that date, relying instead on the testimony of employer's witnesses. Claimant asserts he injured his back on January 22, 1990 when he fell on the deck of a ship, that several co-workers witnessed the incident, and that he reported it immediately to his supervisor. In contrast, employer contends that claimant sustained the injury in a non work-related incident which occurred while he was riding a tractor and clearing debris left in the wake of Hurricane Hugo.

In concluding that the record does not support claimant's claim regarding the occurrence of an incident on January 22, 1990, the administrative law judge specifically noted that when claimant first sought medical treatment for his injury on January 31, 1990, he informed the doctor that his injury was two weeks old, and he paid for this treatment with his personal health insurance instead of informing the doctor that his condition was the result of an eight-day-old work-related injury. Cl. Ex. 4; Tr. at 56, 72, 74. Moreover, the administrative law judge was persuaded by the fact that two of employer's witnesses, Ms. Schram, employer's employment manager, and Mr. Swails, employer's department supervisor, testified that claimant first told them his injury was caused by riding a tractor but that he later claimed it was work-related. Tr. at 72-73, 89-90, 95. Further, the administrative law judge noted that, despite claimant's testimony that he was aware of the proper procedures for reporting an on-the-job accident, there was a one-month delay between the alleged date of injury and the date on which claimant gave notice of the injury to employer. Cl. Exs. 2, 6. Based on these facts, and on his determination that claimant is not a credible witness, the administrative law judge determined that claimant did not injure his back during the course of his employment. Decision and Order at 7-8. Additionally, we note that, although claimant testified there were witnesses to the accident and that he informed his supervisor immediately, no one testified on claimant's behalf to corroborate his testimony. Tr. at 15-16, 25, 54-55.

When there are numerous inconsistencies in a claimant's testimony, an administrative law judge may discredit the claimant's testimony to find that a work accident did not occur. *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd* 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982). In this case, the administrative law judge set forth his rationale for declining to credit claimant's testimony; specifically, the administrative law judge noted the absence of corroborating testimony and the inconsistencies between claimant's testimony and other evidence of record. *See Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and as the administrative law judge's determination herein is supported by substantial evidence and is neither inherently incredible nor patently unreasonable, we affirm his finding that claimant has not established the occurrence of a work-related accident on January 22, 1990. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, as claimant has not established a *prima facie* case and the Section 20(a) presumption is not applicable, the administrative law judge properly denied benefits.[2]

[2]Because we affirm the administrative law judge's finding that claimant's injury is not work-related, we need not address claimant's remaining contentions.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge