

BRB No. 99-0381

JASON DAY )  
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 Claimant-Respondent )  
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 v. )  
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 INSPECTORATE AMERICA )  
 CORPORATION ) DATE ISSUED:  
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 and )  
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 NATIONAL UNION FIRE INSURANCE )  
 COMPANY OF PITTSBURGH )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughn (Mandell & Wright), Houston, Texas, for claimant.

John H. Hughes (Allen & Gooch), Lafayette, Louisiana, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1997-LHC-1710) of Administrative Law Judge Lee J. Romero, Jr., 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged that he suffered an injury to his back on October 27, 1996, when he

slipped from a ladder and fell to the deck of a barge. Claimant immediately informed a co-worker that he had injured his back; he then reported the alleged incident to employer's dispatcher, Mr. Walden, and to his supervisor, Mr. Godinich. That same day, claimant was admitted to the hospital with back pain. Claimant was initially prescribed Flexeril, and later Soma, in an effort to alleviate his pain; these prescriptions prevented claimant from operating a motor vehicle. Subsequently, an MRI revealed a questionable disc herniation, while a discogram revealed an abnormality at L4-5, L5-S1, and an annular tear at that level. In November 1996, employer allegedly offered claimant light-duty employment. On November 18, 1996, as claimant did not "call-in" to his supervisor within a prescribed period, employer considered claimant to be "self-terminated." Claimant has since commenced employment for other employers.

In his Decision and Order, the administrative law judge concluded, based upon the testimony of claimant, that claimant established the existence of working conditions which could have caused his present back condition, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut the same; accordingly, the administrative law judge found causation established. Next, the administrative law judge determined that claimant was incapable of resuming his usual employment duties, but that claimant's post-injury employment between October 10, 1997 and February 14, 1998, and February 18, 1998 through the date of the hearing, established the availability of suitable alternate employment and a post-injury wage-earning capacity. Accordingly, the administrative law judge awarded claimant temporary total disability benefits during the periods of October 27, 1996 through October 8, 1997, and February 15, 1998 through February 17, 1998, and temporary partial disability benefits during the period October 9, 1997 through February 14, 1998, as well as medical benefits, interest, and an attorney's fee. *See* 33 U.S.C. §§907, 908(b), (e).

On appeal, employer contends that the administrative law judge erred in finding that an accident or injury occurred during the course of claimant's employment.<sup>1</sup> Employer

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<sup>1</sup>By Order dated April 28, 1999, the Board dismissed this appeal and remanded the case to the administrative law judge for consideration of claimant's request for modification. Following claimant's withdrawal of this request, employer moved for reinstatement of its appeal. By Order of April 6, 2000, the Board granted the request, reinstated the appeal and advised the parties that the one period for review would commence upon receipt of the

additionally challenges the administrative law judge's determination regarding the reason for claimant's termination in November 1996. Claimant responds, urging affirmance.

Employer initially challenges the administrative law judge's determination that claimant established the existence of a work-related accident or injury which could have caused his present back condition. It is well-established that claimant bears 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 his *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). 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); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, employer does not dispute that claimant has suffered a harm, *i.e.*, an injury to his back, but argues that claimant failed to establish the existence of a work incident which could have caused that condition. In raising this contention, employer states that the incident at issue was not witnessed, that the laws of gravity and physics preclude claimant from falling as he asserts, that claimant had experienced back pain prior to the date of the alleged incident, and that claimant consistently denied, but now concedes, that he sustained a work-injury prior to the incident at issue in the instant case. In addressing this issue, the administrative law judge found that claimant's failure to acknowledge a prior work-event, his alleged inconsistent statements rendered upon his arrival at the hospital on October 27, 1996, and employer's witnesses statements regarding claimant's alleged pre-existing back pain do not prove that claimant did not suffer or incur a harm to his body on October 27, 1996. See Decision and Order at 22-23. Regarding employer's assertion that claimant's version of the alleged accident is implausible, the administrative law judge specifically found that claimant provided definitive testimony with respect to his back condition. Moreover, the administrative law judge found that claimant's testimony throughout the hearing was generally unequivocal and credible, that claimant sustained objective symptoms for which he was treated, and that claimant was thereafter diagnosed with disc abnormalities and a questionable herniated disc. Thus, in concluding that claimant affirmatively established the existence of working conditions which could have caused his harm, the administrative law judge specifically addressed and rejected each of employer's contentions, and relied upon claimant's testimony that he suffered a work-related injury on October 27, 1996, when he slipped off of a ladder and fell to the deck of a barge while working for employer.

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record.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978). In the instant case, the administrative law judge specifically set forth and considered each of employer's concerns and concluded that claimant did, in fact, sustain a work-related accident as described on October 27, 1996. On the basis of the record, the administrative law judge's decision to credit the testimony of claimant is neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's finding that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption. As his finding that employer did not rebut the presumption is not challenged on appeal, the administrative law judge's finding that causation was established is also affirmed.

Lastly, employer asserts that the administrative law judge erred in addressing the issue of whether claimant's discharge by employer in November 1996 was related to his injury; specifically, employer contends that the administrative law judge implicitly raised *sua sponte* the issue of whether Section 49 of the Act, 33 U.S.C. §948a, is applicable to this case. Claimant responds, stating that he sought no remedy before the administrative law judge pursuant to Section 49 and that the administrative law judge properly based his award of compensation to claimant on claimant's inability to return to work. For the reasons that follow, we reject employer's contentions of error.

Section 49 of the Act prohibits an employer from discharging or discriminating against an employee based on his involvement in a claim under the Act and if the employee can show he is the victim of such discrimination he is entitled to reinstatement and back wages. To establish a *prima facie* case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988), *aff'g* 20 BRBS 114 (1987).

In the instant case, however, claimant at no time during the proceedings below sought reinstatement and back wages based upon a claim that his termination by employer in November 1996 was in violation of Section 49 of the Act. Rather, claimant sought compensation benefits pursuant to his alleged inability to return to his usual employment duties with employer. *See* Claimant's LS-18 dated February 19, 1998; Hearing transcript at 14-21; Claimant's post-hearing brief. In addressing claimant's entitlement to compensation

benefits, the administrative law judge determined that claimant, due to the restrictions placed upon him as a result of his use of prescription medications, was incapable of performing either his usual employment duties or the modified work offered to him by employer since claimant was incapable of operating a motor vehicle. Thereafter, the administrative law judge found that the post-injury employment positions obtained by claimant constituted suitable alternate employment, and the administrative law judge fashioned his ultimate awards of temporary total and temporary partial disability compensation based upon those findings. *See* Decision and Order at 25-29. Although, as employer avers, the administrative law judge also found claimant to be entitled to compensation benefits because he was discharged for reasons related to his injury, specifically claimant's failure to "call-in" during the required period of time, the administrative law judge did not reference Section 49 in his decision, nor did he address claimant's possible entitlement to reinstatement and back wages pursuant to that section of the Act. Accordingly, as claimant did not seek nor did the administrative law judge address claimant's entitlement to relief pursuant to Section 49 of the Act, we reject employer's allegation of error. As employer does not contest the administrative law judge's findings that claimant is incapable of resuming his usual employment duties with employer or that claimant's post-injury employment established claimant's post-injury wage-earning capacity, we affirm the administrative law judge's award of temporary total and temporary partial disability compensation to claimant based upon those findings.

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

SO ORDERED.

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

