BRB No. 09-0774

MICHAEL T. GOLD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOLPHIN SERVICES, L.L.C.	)	DATE ISSUED: 06/21/2010
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Tony B. Jobe, Madisonville, Louisiana, for claimant.

William S. Bordelon (Bordelon & Shea, L.L.P.), Houma, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LHC-1915) of Administrative Law Judge Larry W. Price 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 began working for employer as a rigger in September 2007. He alleges he suffered a back and neck injury on November 9, 2007, when he was working with pipes and valves because he woke up in pain on November 10, 2007. He claims to have reported his pain to his supervisor on November 10, 2007; however, there is no accident

report in the record.[1] Claimant continued to perform his regular duties during that hitch offshore, another one in December, and an on-shore detail in January. He last worked for employer on January 17, 2008, when he was fired for violating employer's no-alcohol policy. Claimant did not seek medical attention for his alleged back and neck injury until March 11, 2008, when he went to the emergency room. Cl. Exs. 1, 5, 9. In May 2008, employer referred claimant to Dr. Shults, who ordered a CT scan and an EMG. Although the evaluations revealed a potential singular injury and arthritis, Dr. Shults concluded they did not explain claimant's complaints of pain in his neck and back which radiated into his arms and legs. Rather, Dr. Shults stated those complaints could be explained only if multiple nerve injuries were involved. After performing a final clinical examination in February 2009, which evoked numerous contradictory results, Dr. Shults concluded claimant did not sustain the claimed injury and was exaggerating his symptoms.[2] Cl. Exs. 5, 7; Tr. at 196-204.

The administrative law judge found claimant's credibility suspect, as claimant had contradicted himself as well as the testimony of others, and the administrative law judge determined there was credible medical and other evidence establishing that claimant did not sustain an injury. Decision and Order at 14-15. Accordingly, the administrative law judge found that claimant did not establish the first element of his *prima facie* case. Moreover, the administrative law judge found that, assuming, *arguendo*, claimant established a harm, he did not establish an accident at work in November 2007 that could have caused that harm. *Id.* at 15-16. The administrative law judge found that claimant's "actions are as nonsensical as his testimony," and he denied benefits. *Id.* at 17.

---

[1]Claimant filed four "claim for compensation" forms, each identifying different dates of injury. He testified that he originally gave his lawyer a range of possible dates and could not explain why a specific date was identified. He also stated that, after talking with people and looking at his schedule, he figured out that the correct date was November 9, 2007. Tr. at 104, 162-167.

[2]Claimant originally stated he had back and neck pain. To the doctors, claimant complained of lower back pain burning and radiating to his legs, worse on the right, leg numbness, and bilateral hand/arm pain and numbness. The hospital x-rays from March 11, 2008, showed degenerative changes, notably at C5-6, but otherwise a normal cervical/lumbar spine. The emergency room doctor advised claimant to follow up with his physician; claimant did not. The CT scan from May 27, 2008, showed disc narrowing at C5-6 and L5, and the EMG from June 20, 2008, revealed mild chronic partial right radiculopathy at L5, left and right mild to moderate carpal tunnel syndrome, and no significant evidence of cervical radiculopathy. Cl. Ex. 5.

Claimant appeals the administrative law judge's denial of benefits. He contends the administrative law judge erred in failing to properly apply Section 20(a) of the Act, 33 U.S.C. §920(a), and he contends the administrative law judge denied him due process of law by failing to order employer to authorize his choice of physician pursuant to Section 7 of the Act, 33 U.S.C. §907, and Section 702.403 of the regulations, 20 C.F.R. §702.403, in accordance with the district director's recommendation. Employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *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); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the 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(CRT) (1994).

Claimant contends the administrative law judge erred in finding he did not establish a harm. Although the CT scan and the EMG results are not contemporaneous with the alleged date of injury, the CT scan revealed disc narrowing at C5-6 and L5, and the EMG revealed mild chronic partial right radiculopathy at L5, as well as left and right mild to moderate carpal tunnel syndrome. Dr. Shults acknowledged the positive results of the EMG and CT scans; however, he opined that the problems revealed therein do not correspond to the numerous complaints claimant made, and the test results cannot explain whatever pain claimant was experiencing. Cl. Ex. 5; Tr. at 196-204, 211, 213, 229-232. Thus, there is evidence in the record to support the administrative law judge's determination that claimant has not established the harm element, as claimant did not establish the harm alleged.

The EMG and CT scan results, however, arguably establish that claimant has a harm in accordance with the Section 20(a) presumption. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (something wrong with the human frame). Any error by the

administrative law judge in this regard is harmless as, to establish the compensability of his claim, claimant also must establish that an accident occurred at work or that working conditions existed which could have caused his back condition.[3] *See Bolden*, 30 BRBS 71; *Jones v. J. F. Shea Co., Inc.*, 14 BRBS 207, 210-211 (1981); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *U.S. Industries*, 455 U.S. 608, 14 BRBS 631. Substantial evidence supports the administrative law judge's finding that claimant did not establish the accident element of his *prima facie* case.

The administrative law judge found that the alleged November 9, 2007, injury was not witnessed by anyone, and he found that claimant's credibility concerning the occurrence of an accident that day was impeached by his own contradictory statements, as well as by the credible testimony of other witnesses. Accordingly, the administrative law judge determined that claimant's statements are insufficient to establish the occurrence of an accident as alleged. Decision and Order at 15. The administrative law judge discredited claimant's testimony because his explanation of the events immediately following his work on November 9, 2007, was confusing and inconsistent. For example, although claimant alleges he awoke in pain on the morning of November 10, 2007, he did not report his alleged injury at the daily safety meeting that morning, even though his supervisor was present and the meeting typically concerned safety and injury issues. Rather, claimant testified at his deposition that, after the meeting, he told Mr. Hopkins and Mr. Higginbotham he was hurting, but at the hearing he stated he told Mr. Higginbotham he was in pain and he was "pretty sure" that thereafter they went to see Mr. Hopkins. Cl. Ex. 1 at 60; Tr. at 90. He also testified that Mr. Hopkins took claimant to Mr. Parks to fill out an accident report. Mr. Higginbotham and Mr. Parks, both of whom the administrative law judge credited on this issue, respectively testified that they never saw an accident, or took claimant to report an accident, or filled out an accident report.[4] Decision and Order at 16; Tr. at 278-279, 283, 298; Dep. Parks at 6, 20-21.

The administrative law judge also found claimant's testimony incredible because there was no evidence to support his statements that co-workers saw him working in pain.

[3]We need address only the claim regarding the allegation that something occurred on November 9, 2007, to cause claimant's back and neck pain, as that was the only claim made. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Brown v. Pacific Dry Dock*, 22 BRBS 284, 286 n.2 (1989).

[4]Mr. Hopkins testified that claimant made a statement about his back hurting sometime in November 2007. He was uncertain as to whether he brought it to Mr. Parks's attention and whether an accident report had been completed. Cl. Ex. 2 at 17, 21-23; Cl. Ex. 3; Tr. at 28-30, 36. Because of the uncertainty, the administrative law judge gave this portion of Mr. Hopkins's testimony less weight. Decision and Order at 16.

Decision and Order at 9-10, 13, 16. Specifically, the administrative law judge found that Messrs Higginbotham, Hopkins, Almarez, and Rodrigue all credibly testified that claimant appeared to be working normally with no difficulty and that he worked 12 to 15 hours each day and did not ask for accommodations or to see a medic. Decision and Order at 16; Cl. Exs. 2-3; Tr. at 41, 49, 267-268, 278, 285-286, 301-303, 308. Mr. Rodrigue also credibly testified that he and claimant went deer hunting shortly after this accident was alleged to have taken place. Decision and Order at 16; Tr. at 269, 275-276. The administrative law judge also relied on the fact that claimant did not seek medical attention for his back until March 11, 2008, despite having been ashore between November 19 and 26 and after mid-December. Claimant explained he did not go to the doctor because his pain was easing, and he only visited a doctor once in December 2007 because he had a rash on his face. Cl. Ex. 18; Emp. Ex. 3; Tr. at 96. Further, contrary to his statement that his pain was lessening, claimant also testified that he began drinking to ease his pain, and that is why he was fired in January 2008. Tr. at 95-99. The administrative law judge stated that these internal and external inconsistencies rendered claimant's testimony nonsensical, stretching "credulity beyond rational logic." Decision and Order at 17.

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). In this case, the administrative law judge rationally declined to credit claimant's testimony or his version of events. His determination is not patently incredible or inherently unreasonable, as the record contains the cited contradictory conduct and statements. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Absent claimant's testimony, the record contains nothing to corroborate his assertions that he suffered a work injury on November 9, 2007. As claimant did not establish that a work accident occurred on November 9, 2007, he has not established an essential element of his claim for benefits. Therefore, we affirm the administrative law judge's denial of benefits. *Bolden*, 30 BRBS at 72-73; *Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275, 279-280 (1981); *Jones*, 14 BRBS at 210-212.

As claimant's back condition is not work-related as a matter of law, employer is not liable for any medical treatment for that injury. 33 U.S.C. §907; *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); 20 C.F.R. §702.402. Accordingly, claimant's assertion that the administrative law judge denied him due process by failing to order employer to authorize treatment with claimant's choice of physician is moot.[5] We also reject

[5]In any event, it is the district director who has the authority to authorize a claimant's choice of physician. *See Jackson v. Universal Maritime Service Corp.*, 31

claimant's argument that the administrative law judge's decision does not comport with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). The decision is thorough, comprising 17 pages of evidentiary summary and analysis, and it is supported by substantial evidence of record.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

BRBS 103 (1997) (Brown, J., concurring); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). Despite the district director having made the recommendation in July 2008, Emp. Ex. 16, claimant did not seek medical attention from his choice of physician at any time during these proceedings.