

DEBORAH BERTRAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OMNI ENERGY SERVICES, CORPORATION	)	DATE ISSUED: <u>March 11, 2014</u>
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
Employer/Carrier- Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Leslie R. Leavoy, Jr., Deridder, Louisiana, for claimant.

Jeffrey I. Mandel and Elizabeth Lynn Finch (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-01501) of Administrative Law Judge Patrick M. Rosenow 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 worked for employer as a day-shift dispatcher. On April 4, 2008, her shift ended at 6:00 p.m., and another dispatcher, Ms. Fortmayer, came on duty for her 12-

hour shift. At approximately 7:00 p.m., a supply boat, the *Mediterranean*, docked to be loaded with supplies. Claimant testified that, despite being off-duty, she went to the vessel to communicate with the captain and the crane operator to make sure the appropriate supplies were loaded. She stated that, near midnight, after the vessel was loaded, she left the boat, only to return a short time later to tell the captain that he needed to wait for another item, so the vessel should remain moored until the item arrived. Claimant testified that she needed to talk to the captain in person because the radios were not operating properly. She stated that, as she stepped toward the vessel to board with the help of a dockhand, she fell into the water. She next remembered being on the shore, soaking wet and bleeding. EX 23 at 106-115; Tr. at 70-73, 125-126, 128, 146-147.

Claimant testified she does not remember much of the remainder of the night, though she stated in her deposition that she drove off the property, changed into dry clothes, and returned for her shift later, perhaps around 3:00 a.m. EX 23 at 119-121. Claimant's next shift began at 6:00 a.m., but at approximately 7:00 a.m., claimant was found in her van on employer's premises, in pain and crying. Claimant refused to discuss her injuries or to permit assistance from anyone at work, a sheriff's deputy, or an ambulance crew. EXs 2, 5-6. Claimant had friends take her to Oschner Medical Center where she was diagnosed with a large bruise on her abdomen, a swollen knee, and other contusions. EX 15.<sup>1</sup> Claimant filed a claim for benefits, and employer controverted the claim. EX 2.

The administrative law judge found that claimant is not a credible witness and that she failed to establish the occurrence of a work incident on April 5, 2008, that could have caused her injuries. Accordingly, the administrative law judge denied the claim for benefits under the Act. Decision and Order at 17-19. Claimant appeals the denial of her claim, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding she did not present credible evidence of a work-related accident on April 5, 2008. In this regard, claimant contends the administrative law judge relied on documents not in the record to reach his conclusion that claimant's testimony is not credible. Specifically, claimant asserts the administrative law judge erred in relying on evidence referring to emails that were not introduced into evidence. We reject claimant's contention because it mischaracterizes the administrative law judge's findings and lacks merit.

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<sup>1</sup> Claimant, on the in-take form, indicated she also had head pain, but diagnostics revealed no head injury, and she was discharged with instructions for taking care of sprains, bruises, and abrasions only. EX 15.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a prima facie case. To establish a prima facie case, the claimant must establish that she sustained a harm or pain and that conditions existed or an accident occurred at her place of employment which could have caused the harm or pain. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *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); *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.

In this case, claimant introduced evidence demonstrating that she sustained a “harm.” CX A; EX 15. The administrative law judge acknowledged that claimant suffered “some significant physical trauma,” and this finding is not contested. Decision and Order at 18. Therefore, claimant has established the “harm” element of her prima facie case. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). The administrative law judge found, however, that the evidence is more equivocal on, and that claimant failed to establish, the work-related “accident” element of her case. Contrary to claimant’s assertion, substantial evidence supports the administrative law judge’s conclusion that she did not establish the occurrence of an accident at work that could have caused her harm.

In considering whether a work accident occurred, the administrative law judge addressed the testimony of all witnesses and found that the direct evidence is contradictory. Thus, he focused on the credibility of the testimonial evidence. With regard to credibility, the administrative law judge found: 1) claimant had significant memory gaps; 2) no witness corroborated claimant’s assertion that she had special authorization to be on the *Mediterranean*; 3) many witnesses either did not corroborate claimant’s account or directly impeached it, making her credibility questionable; and 4) internal inconsistencies among claimant’s actions, statements, and testimony also “create[d] a lack of confidence in her credibility.” Decision and Order at 18. He concluded that two particular pieces of information weighed heavily against claimant’s credibility. First, the administrative law judge gave great weight to “her clear and direct statement to the deputy that her accident did not happen on Employer’s worksite.” *Id.*; EX 6-7;<sup>2</sup> Tr. at 75, 193-197. He also gave great weight to evidence that claimant sent a

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<sup>2</sup> Deputy Bloomer’s report also stated that, in response to his inquiry about what had happened to claimant, she stated: “It did not happen on Omni Property, I don’t want to talk about it.” EX 6 at 3. The deputy’s actions and questions were captured on his vehicle’s recorder, EX 7, and claimant, although she could not remember having the conversation, did not dispute that she made those statements to him. *See* Decision and Order at 9; Tr. at 75.

series of emails to a representative of employer following her alleged fall wherein, rather than being at the dock to talk to the captain of the *Mediterranean*, she claimed to have been at the dock video-taping safety violations. See EX 4 (first report of injury). The administrative law judge found her failure to testify to this at the hearing was a significant omission. Decision and Order at 18. Moreover, the administrative law judge stated that the circumstantial corroborative evidence of claimant's fall, her physical trauma, was outweighed by the contradictory direct evidence and the unaccounted-for hours between the time claimant allegedly left the vessel and when she was found injured. Decision and Order at 18-19; see EX 5 (investigator's report stating no one saw claimant fall, no one saw claimant in wet clothes, and claimant refused to discuss any injuries); EX 24 at 1, 3 (supervisors' statements that claimant had a dispute with them over moving her personal belongings out of a room and that claimant was not given special authorization to work with/on the *Mediterranean* load-out); EX 24 at 7-10 (four other employees' statements that claimant either was not wet or injured, or would not discuss what was wrong); EX 24 at 11-12 (crane operator's statement that claimant was dry when she left the dock area); EX 24 at 13 (captain's statement that he did not see claimant in the water and was not sure if she was wet when he next saw her and that the radios were working); EX 24 at 6, 15; EX 25 (night dispatcher's statement that claimant was not wet or injured when she saw her at 3:30 a.m. and that the radios were working).

Although, as claimant asserts, the emails were not submitted into evidence, the administrative law judge did not rely solely on them to render his conclusion about claimant's credibility. Rather, he identified multiple discrepancies in claimant's testimony and statements, and he credited statements from other witnesses who contradicted claimant's statements. 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 did not credit claimant's version of events or claim that she was injured when she fell into the water on employer's premises. His credibility determination is not inherently incredible or patently unreasonable, as the record contains the cited contradictory evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Moreover, the emails on which claimant asserts the administrative law judge erroneously relied were referenced in employer's first report of injury which was admitted into evidence without objection. EX 4. Section 23(a) of the Act, 33 U.S.C. §923(a), states that in conducting a hearing, the administrative law judge is not bound by common law or statutory rules of evidence or procedure but may conduct the hearing "in such manner as to best ascertain the rights of the parties." See also 20 C.F.R. §§702.338-702.339; *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l*,

*Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984). In this case, the administrative law judge rationally relied, in part, on a reference to the emails in a document which was admitted into evidence. Claimant has shown neither error nor an abuse of discretion in the administrative law judge's decision to rely, in part, on this evidence.<sup>3</sup> See generally *Allen v. Agrifos, LP*, 40 BRBS 78 (2006).

We affirm the administrative law judge's determination that claimant's testimony is not credible as it is supported by substantial evidence and does not constitute an abuse of discretion. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). The administrative law judge fully discussed the relevant evidence concerning the alleged work incident and found that, at best, the evidence of the accident's occurrence is "equivocal" and "contradictory;" therefore, he concluded that claimant did not establish that a work accident occurred that could have caused her injuries. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990); see generally *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996) (equivocal evidence does not satisfy a claimant's burden). As this finding is supported by substantial evidence and as claimant failed to establish the occurrence of the accident claimed, an essential element of her prima facie case, or to identify any reversible error made by the administrative law judge in evaluating the conflicting evidence and in making credibility determinations, the administrative law judge's denial of benefits is affirmed. *Bolden*, 30 BRBS at 72-73.

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<sup>3</sup> The administrative law judge considered claimant's failure to mention that she allegedly fell while recording safety violations to be a "significant part of her story that one would have expected to be included in her live testimony." Decision and Order at 18. This could be interpreted, as employer asserts, as utilizing his discretionary authority to apply an adverse inference against claimant in light of her failure to submit the emails into evidence as well as the fact that they contradicted claimant's stated reason for being at the dock. See *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); see also *BNSF Ry. Co. v. Brotherhood of Maintenance*, 550 F.3d 418, 424 (5th Cir. 2008).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge