BRB No. 04-0183

DUC NGOAN MAI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KNIGHT & CARVER MARINE	)	DATE ISSUED:Oct. 15, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY CORPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree, San Diego, California, and Jack H. Swift, Grants Pass, Oregon, for claimant.

James P. Aleccia and Michael T. DeMicco (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-1766) of Administrative Law Judge William Dorsey 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).

Employer is engaged primarily in the business of building, repairing and modifying boats and yachts at a site along the San Diego waterfront. Employer has two bays for this work. A third bay is used to repair and/or refurbish fiberglass rotor blades from windmill turbines.[1] Claimant was injured while repairing a windmill rotor blade. Claimant filed a claim under the Act, alleging that he also assisted in employer's shipbuilding operation.

The administrative law judge found that the only evidence of claimant's work in the shipbuilding/repair bays was claimant's testimony. Claimant testified that he was assigned to clean up around vessels under construction and to hand out tools to other ship repair workers. The administrative law judge found that this testimony was not credible in view of the testimony of claimant's co-workers and employer's managers that claimant worked exclusively in the windmill rotor repair operation and was not subject to reassignment in the ship repair bays. Decision and Order at 3. Claimant also attempted to introduce a statement from a co-worker, Mr. Cisneros, that claimant spent five percent of his time working in the ship repair area. The administrative law judge refused to admit this statement into evidence because it was not disclosed to employer in compliance with the administrative law judge's pre-hearing order. Moreover, Mr. Cisneros testified at the formal hearing and repudiated his prior statement. He testified that he was pressured into making the earlier statement, and that claimant worked only on the windmill rotor blades. The administrative law judge concluded that claimant failed to establish he was engaged in any maritime employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3), and he therefore denied benefits under the Act.

In order to be covered under the Act, a claimant must establish that he was a "maritime employee" pursuant to Section 2(3) of the Act,[2] and that he was injured on a covered situs pursuant to Section 3(a) of the Act.[3] *See Northeast Marine Terminal Co. v.*

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[1] The windmills generate electricity from wind in the desert near Palm Springs, California.

[2] Section 2(3) states:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . .

33 U.S.C. §902(3).

[3] Section 3(a) states:

Caputo, 432 U.S. 249, 6 BRBS 150 (1977). A claimant satisfies the status test of Section 2(3) if he spends "at least some" of his time in indisputably covered activity. *Id.*, 432 U.S. at 273, 6 BRBS at 165; *Maher Terminals, Inc. v. Director, OWCP [Riggio]*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir.), *cert. denied*, 124 S.Ct. 957 (2003); *Sea-Land Services, Inc. v. Director, OWCP [Ganish]*, 685 F.2d 1121 (9th Cir. 1982). In this case, the administrative law judge found that claimant did not establish that he spent any of his time in covered activity, as he worked solely on the windmill rotor refurbishments.

On appeal, claimant does not challenge any of the administrative law judge's credibility determinations, which we affirm as they are rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Rather, claimant contends that the administrative law judge should have drawn an adverse inference from employer's failure to introduce into evidence claimant's time cards which, claimant alleges, show the type of employment in which he was engaged each day. Claimant contends that the administrative law judge should have found that the time cards would disclose that claimant engaged in maritime employment. Claimant therefore contends either that the finding that he was not engaged in maritime employment should be reversed or that the case should be remanded for reconsideration in view of employer's failure to produce potentially dispositive evidence. Employer responds that an adverse inference cannot be used to establish essential elements of claimant's case. Employer further contends that claimant failed to use the discovery process to obtain the time cards. We reject claimant's contentions and affirm the denial of benefits.

At the hearing, employer called Eric Petronovich, the head of the Fiberglass Department as a witness. He testified that claimant worked exclusively in the windmill rotor department. Tr. at 85-88. On cross-examination, Mr. Petronovich testified that all the workers keep timecards that denote their daily job activities. Tr. at 98. In the case of claimant, Mr. Petronovich testified that claimant did not fill out the time card himself, but that claimant's immediate supervisor, Leo Martinez, filled it out. *Id.* Although Mr.

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). Employer conceded that its site is a maritime situs pursuant to Section 3(a).

Petronovich's testimony was corroborated by Barry Brownley, claimant's co-worker, it was disputed in part by Mr. Martinez, who testified that either he or the employee put the job codes on the time cards. Tr. at 111, 125.

At the conclusion of the testimony, claimant's counsel asked the administrative law judge to draw an adverse inference against employer regarding claimant's job duties due to employer's failure to introduce the time cards into evidence. Employer countered that claimant failed to request the time cards through discovery mechanisms. Tr. at 138. This exchange was quite cursory, and the administrative law judge did not rule on the issue either at the hearing or in his decision.

The "adverse inference rule" provides: "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. [citation omitted]. Silence then becomes evidence of the most convincing character." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). The adverse inference rule may be used in administrative proceedings. *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) v. N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972); *see also Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982). However, it "is generally recognized that the inference is drawn against the party with the burden of persuasion on an issue. . . ." *N.L.R.B. v. Cornell of California, Inc.*, 577 F.2d 513 (9th Cir. 1978). Thus, an adverse inference "will not convert evidence otherwise insufficient into a prima facie case. It will not excuse a failure of the [moving party] to meet the burden of establishing facts sufficient to make out a case. . . ." *U.S. v. Roberson*, 233 F.2d 517, 519 (5th Cir. 1956); *see also Vaughn v. Coccimiglio*, 241 Cal.App.2d 676 (Cal.Dist.Ct.App.1966) (same, citing 2 WIGMORE ON EVIDENCE, §290 at 179); 31A C.J.S. *Evidence* §175 (2004).

We reject claimant's contention that an adverse inference should have been drawn based on employer's failure to produce claimant's time cards. Such an inference cannot substitute for claimant's failure to establish an essential element of his claim, namely, that he engaged in maritime employment. *Id.* Moreover, employer correctly contends that claimant could have obtained this evidence through discovery, but apparently made no attempt to do so. The Board's decision in *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989), suggests the manner in which the adverse inference rule works in conjunction with the discovery process. In *Brown*, the claimant's last employment was with the employer in September and October 1980. He filed a claim against only the employer, contending he was exposed to asbestos during this last period of employment. The administrative law judge found that claimant was not exposed during this employment, an issue on which claimant bore the burden of proof. Claimant contended, *inter alia*, that the administrative law judge should have drawn an adverse inference concerning the presence of asbestos due to employer's failure to produce a contract for asbestos removal that claimant had requested pre-hearing and which the administrative law judge had

ordered to be produced. The administrative law judge refused to draw the inference because she stated claimant did not timely raise the issue.

The Board held that there is no restriction on when a party can move for an adverse inference to be drawn. *Brown*, 22 BRBS at 287. Nonetheless, the Board held the administrative law judge's error to be harmless, as employer responded to the motion to compel by stating that it did not possess the documents requested and as claimant did not question employer's witnesses at the hearing concerning the possible existence of the documents. *Id.* at 287-288. Thus, the Board rejected the contention that the administrative law judge abused her discretion in refusing to draw an adverse inference concerning the presence of asbestos. Employer's failure to proffer admission of the time cards does not entitle claimant to application of the adverse inference rule in this case, *i.e.*, a determination that employer withheld evidence which would have proven claimant's maritime employment. If claimant believed that the time cards would have shown his maritime employment, he should have subpoenaed them, because he bore the burden of proof on this issue. He did not do so; as a result, employer was under no obligation to proffer their admission. As claimant has raised no error in the administrative law judge's finding that he did not engage in any maritime employment, we affirm the denial of benefits. *See generally Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge