BRB No. 06-0223

JAMES BEAVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICES, INCORPORATED	)	DATE ISSUED: 10/30/2006
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen, P.C.), Hoboken, New Jersey, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar, L.L.P.), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-2710) of Administrative Law Judge Janice K. Bullard 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 hustler driver. He testified that, on July 8, 2002, he was told to "keep an eye" on Mr. Koslow, a co-worker with duties at the customs platform. Tr. at 15. Claimant stated that he tried to show Mr. Koslow a more efficient way to read and cut the seals on the containers and that, while he was in a crouched position to read a seal, Mr. Koslow unexpectedly punched him twice in the right eye, causing him to fall backwards. Tr. at 16-18. In December 2002, claimant was diagnosed as having no light perception in his right eye. Cl. Ex. 2. Claimant contends the July 2002 incident caused the blindness in his right eye, and he filed a claim under the Act for disability and medical benefits.

The administrative law judge found that claimant is not a credible witness and that there is no evidence to corroborate claimant's allegations. Specifically, Mr. Koslow's testimony contradicted claimant's story and no one saw an altercation or the results of one. She also found that claimant's delay of five months before going to the eye doctor "defies logic[,]" Decision and Order at 18, and she concluded that claimant gave her little reason to believe he had been punched at work. The administrative law judge also stated that employer gave her little reason to believe that claimant had not been punched and that the medical evidence was inconclusive.[1] Decision and Order at 18-19. Accordingly, she concluded that claimant failed to prove that his blindness was related to his work. Decision and Order at 19. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that he did not establish a *prima facie* case to invoke the Section 20(a) presumption. He argues that he has demonstrated both a harm and conditions at work that could have caused the harm. Thus, he argues he is entitled to the presumption and, as employer has not rebutted the presumption, his injury is work-related as a matter of law. Alternatively, claimant requests remand for the administrative law judge to reconsider the issue using the proper standard, as he believes the administrative law judge placed an improper burden on him.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. To establish his *prima facie* case, the claimant must show that he sustained a harm and that conditions existed or an accident occurred at work which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal*

[1]Three doctors stated that the trauma of a punch could have caused claimant's retina to detach, causing blindness. Two of the three doctors also stated that a detached retina could have been caused spontaneously by the pre-existing chronic inflammation in claimant's eye. Cl. Ex. 7 at 19; Emp. Exs. F at 14, G at 24.

Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). 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); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000).

Claimant had a history of eye problems prior to July 2002. He had been seen by Dr. Constad in February 2002 and diagnosed with cataract, corneal edema, corneal dystrophy and changes related to inflammation, with the right eye being worse than the left eye.[2] Cl. Exs. 3, 5. In June 2002, claimant's vision was worse due to ischemia, cataract and corneal changes. Claimant was advised to return in six months for a follow-up and to come sooner if there were problems. *Id.* Claimant next saw Dr. Constad in December 2002. Dr. Constad reported that claimant stated he had been "sucker punched" in July and that he had called the office but did not make an appointment. In December 2002, claimant was diagnosed as having no light perception in his right eye and 20/30 vision in his left eye. An ultrasound showed retinal detachment in the right eye. Dr. Constad determined that claimant's right eye condition was permanent without possibility of surgical repair. Cl. Ex. 3. The administrative law judge found that claimant's blindness occurred sometime between June and December 2002. Decision and Order at 18.

It is undisputed that claimant has established a harm: he is blind in his right eye. To establish the compensability of his claim, however, he must establish that an accident occurred at work or that working conditions existed which could have caused his blindness. *See Bolden*, 30 BRBS 71; *Jones v. J. F. Shea Co., Inc.*, 14 BRBS 207, 210-211 (1981); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *U.S. Industries*, 455 U.S. 608, 14 BRBS 631. Claimant bears the burden of establishing the elements of his *prima facie* case by the preponderance of the evidence and without the benefit of the Section 20(a) presumption. *Bolden*, 30 BRBS 71; *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). We hold that substantial evidence supports the administrative law judge's finding that claimant did not establish the working conditions element of his *prima facie* case.

[2]The right eye was correctable to 20/40, and the left eye was correctable to 20/25. Cl. Exs. 3, 5.

In addressing the question of whether there was an incident on July 8, 2002, the administrative law judge summarized the testimony and reports of the witnesses. She found that claimant's testimony was contradicted by that of Mr. Koslow, who denied punching claimant, Tr. at 49-59. Decision and Order at 13-15. She also found that the best evidence that claimant lost his vision in July 2002 was that he was later transferred from driving hustlers to working in the holds of ships because he could no longer see out of one eye. However, no witness could state when claimant's transfer took effect, and the administrative law judge believed that claimant would have kept his loss of vision secret for as long as possible, just as he kept it from the state when renewing his driver's license shortly before the hearing, so she gave little weight to the timing of the transfer. Decision and Order at 18. Overall, the administrative law judge found that claimant's conduct and inconsistent testimony undermined his credibility. Decision and Order at 15-17.

In finding that claimant is not credible, the administrative law judge identified a number of inconsistencies. First, she stated that claimant testified in his deposition that, after he was punched, he only had words with Mr. Koslow, Emp. Ex. B at 43, whereas at the hearing he stated that he tackled Mr. Koslow to prevent further physical harm, Tr. at 35. Next, though she gave it less weight, the administrative law judge found that claimant did not report the incident to anyone until he filed his claim for compensation. She noted that although claimant testified that he tried to file a report but was discouraged from doing so by union and management personnel because fighting is not tolerated and he would have lost his job, Tr. at 19-22, he did not call these people as witnesses to corroborate his testimony.[3] Decision and Order at 16-17, n.16. The administrative law judge also noted that claimant was inconsistent about when he lost his vision. At his deposition, he stated he "blacked out" immediately, Emp. Ex. B at 38-39, but at the hearing, he testified he continued to work that day and noticed he could not see the next morning when he was shaving, Tr. at 22, and in January 2003 he told Dr. D'Alberti he experienced "floaters" in his right-eye for three days before he lost his vision completely, Emp. Exs. A, G at 16. Decision and Order at 16. Finally, the administrative law judge stated that "[c]laimant's delay of five months before seeking treatment for the loss of his vision defies logic." Decision and Order at 18. She found that although claimant testified he called his eye doctor on July 9, 2002, Tr. at 22, Dr. Constad's records did not reflect any such contact, Emp. Ex. F at exh. 1-3, and even if claimant called, his claim that he was told to wait until December because the doctor was too busy, Tr. at 22, contradicted not only Dr. Constad's policy of immediately treating emergencies, Emp. Ex. F at 7-10, but also the fact that someone made an appointment for claimant in August 2002 to be examined in September 2002, Emp. Ex. F at 6, 9, exh. 1-

[3]According to management, claimant would have been reinstated after the investigation if it was determined he was not at fault. Tr. at 89.

3.[4] Decision and Order at 15-16. The administrative law judge stated that claimant claims to have lost his sight on July 8, but his first verifiable attempt to seek medical attention was in August, six days before filing his claim for compensation, and she found that claimant's failure to mention the September appointment in either his deposition or at the hearing, cast doubt on his testimony as to when and how he lost his vision. *Id.* at 18. Therefore, the administrative law judge concluded that claimant gave her little reason to believe he lost his vision in a fight with his co-worker on July 8, 2002. *Id.*

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, it is clear that the administrative law judge did not credit claimant's testimony or his version of events, Decision and Order at 15, 18. Her determination is not patently incredible or inherently unreasonable, as the record contains the cited contradictory conduct and statements, and it must therefore be affirmed. *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 no evidence establishing that Mr. Koslow punched claimant in the eye. As claimant has not persuaded the administrative law judge that he was hit by Mr. Koslow, he has not established an accident or conditions at work that could have caused his blindness. As the administrative law judge's conclusion that claimant failed to establish a *prima facie* case is rational and supported by substantial evidence, we affirm the denial of benefits.[5] *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.

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[4]Claimant did not show up for the September 2002 appointment. Emp. Ex. F at 6, 9, Exh. 1-3.

[5]We reject claimant's assertion that the administrative law judge held him to an inappropriate standard. After discrediting claimant's testimony, the administrative law judge found that the medical evidence was inconclusive as to causation because it revealed a number of possible causes for claimant's loss of vision but did not establish that claimant's blindness "was caused by the specific trauma alleged by Claimant." Decision and Order at 19. Even if this language is viewed as requiring that claimant establish with affirmative medical evidence that working conditions in fact caused his blindness, which is not required under Section 20(a), *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), any error is harmless. Because claimant did not establish a *prima facie* case, the issue of medical causation is not reached. As the administrative law judge found, the medical statements do not establish that a physical altercation between claimant and Mr. Koslow actually occurred and caused claimant's harm. Rather, they show only that if the altercation occurred, then it could have caused claimant's blindness.

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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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge