BRB No. 10-0242

PABLO BANGUERA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ATLANTIC SOUNDING, INCORPORATED	)	DATE ISSUED: 10/29/2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Pablo Banguera, Shirley, New York, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2007-LHC-1898) of Administrative Law Judge Adele Higgins Odegard 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). In an appeal by a claimant without representation by counsel, the Board will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, 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). If they are, they must be affirmed. *Id.*

Claimant worked as a carpenter for employer from September 13, 2006, until February 14, 2007, on the L&G Pass Project which spanned the Sabine Pass between Texas and Louisiana. Tr. at 23. Claimant contends he injured his back at work on February 8, 2007. On February 12, 2007, after complaining of what he thought was kidney pain, he was transported to a hospital emergency room where he related two days of pain and was diagnosed with a mild muscle spasm and muscle strain. Cl. Ex. C. He

was prescribed medication and told to remain off work for two days. *Id.* Claimant last worked for employer on February 14, 2007, and he filed a claim for benefits on May 28, 2007.

The administrative law judge found that claimant has a harm, as medical records, claimant's testimony, and her observation of the claimant establish that he has back problems. The administrative law judge found, however, that claimant failed to establish that an accident occurred at work which could have caused his back condition, as claimant's differing descriptions of how he was hurt rendered his testimony incredible. Decision and Order at 15-19. Therefore, the administrative law judge found that claimant failed to establish a *prima facie* case relating his injury to his employment, and she found that the Section 20(a), 33 U.S.C. §920(a), is not invoked. Accordingly, she denied the claim. Claimant, without legal representation, appeals.[1]

Claimant contends the administrative law judge erred in denying benefits. 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 and that conditions existed or an accident occurred at work which could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal 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). 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. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Claimant testified that he injured his back on February 8, 2007, while he climbed up into a "509 crane." He stated that three co-workers saw him and that he told them he had back pain, but he thought it was related to his kidneys. Tr. at 27-32. Claimant did not report this incident; however, he called in sick the next day due to the pain. He stated he worked on February 10 in pain, reported to work on Monday, February 12, in pain and then was taken to the hospital. He stayed home on February 13 and reported to work in pain on February 14. His boss sent him home early, and this was the last day he worked for employer. Tr. at 32-55.

[1]On September 2, 2010, employer filed a belated motion for leave to file a response brief out of time. Our disposition of this case renders employer's motion moot; therefore, we deny the motion. 20 C.F.R. §§802.212, 802.217(b).

The medical records contemporaneous with the alleged injury indicate that, as of February 12, claimant had had back pain for two days, but denied any known injury, and as of March 19, 2007, claimant still had back pain radiating into his right leg, reportedly caused by lifting something heavy at work, but his x-rays were normal. Doctors noted only tenderness and muscle spasm upon examination with no fractures or acute findings. Cl. Exs. C-D. Claimant next returned to a doctor in April 2008. On the first visit, he reported a work incident in February 2007 where he hurt his back when he tried to lift and twisted his lower back. Two days later, to the same physician, he recounted climbing on a crane and twisting his back when the crane began to lift. In August 2008, claimant's MRI revealed, among other things, a disc tear at L3-4 and multi-level degenerative disc disease. Cl. Ex. E. In October 2008, claimant informed a doctor that he was injured in a fall while working in February 2007. Cl. Ex. F.

The administrative law judge found that other documents also reveal discrepancies in claimant's account of how his injury occurred. His claim for compensation filed on May 28, 2007, alleges an injury on February 10 when he climbed from shore to shore to pick up tools, and his supervisor's injury report, filed February 15, 2007, indicates the cause of the injury is unknown. Cl. Exs. A-B. A Weeks Marine injury report, also dated February 15, 2007, states that claimant completed the employee injury report but stated he did not know when he sustained an injury, and a statement by a co-worker indicates he saw claimant in pain as he was coming down stairs on February 8 and that he saw claimant immediately report an incident to security. Cl. Ex. H; Emp. Ex. 3. Other individuals claimant identified as witnesses, who were interviewed during the investigation, stated they did not observe any accident involving claimant. Emp. Exs. 5-6.

The administrative law judge found that there are too many inconsistencies in the evidence and there is no corroborating evidence to support claimant's claim that an accident occurred at work. She stated that even if she presumed claimant was merely mistaken about the date of the injury, the discrepancies caused her to question claimant's credibility. Decision and Order at 16-18. She noted that claimant gave many different descriptions of the alleged incident and did not describe his injury as having occurred while climbing up a crane until approximately one year after the alleged incident. *See* Emp. Ex. 9. The administrative law judge observed that claimant never explained why he changed his account of the injury. Decision and Order at 17. Additionally, the administrative law judge compared claimant's initial medical reports to his later MRI and reports and determined, based on the doctors' diagnoses, that the early 2007 reports were

not consistent with the type of injury demonstrated by the 2008 MRI.[2] *Id.* Although the administrative law judge declined to find that claimant was being deliberately deceitful, she declined to credit his uncorroborated testimony that he had an accident at work.

It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge rationally rejected claimant's testimony concerning the occurrence of an incident at work. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant failed to establish the "work incident or accident" element necessary for invocation of the Section 20(a) presumption, which is an essential element of his claim for benefits, we affirm the administrative law judge's denial of benefits. *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *see also Bolden*, 30 BRBS 71; *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201, *vacated on other grounds on recon.*, 24 BRBS 63 (1990).

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

[2]The administrative law judge noted that Drs. Sultan and Berg, specialists who examined claimant in 2008, specifically discounted any relationship between claimant's present condition and any work incident in February 2007. Emp. Exs. 9-11.