BRB No. 11-0241

MARTHONE JONES Claimant-Petitioner v. DANOS & CUROLE MARINE CONTRACTORS and GRAY INSURANCE COMPANY Employer/Carrier-Respondents	)))))))))))))))	DATE ISSUED: 10/26/2011 DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

W. Patrick Klotz (Klotz & Early), New Orleans, Louisiana, for claimant.

Timothy B. Guillory (BrownSims, P.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-0157) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and 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 roustabout/rigger from April 7 to August 22, 2004. Claimant alleges that he injured his back in June or July of 2004 while lifting a "sub," weighing between 50 and 100 pounds, from a basket. Claimant does not remember the exact date of the injury. Claimant did not tell his employer or supervisor about his injury on the day of the accident; however, claimant states he told his supervisor, Kurt Taylor, sometime after the accident that he had sustained a work-related back injury while lifting "subs." Neither claimant nor Mr. Taylor filled out an accident report. After retaining counsel, claimant filed a claim for compensation in November 2004. Claimant alleges that his work-related back injury has left him disabled from work.

The parties stipulated: that the Act applies to this claim; an employer/employee relationship existed at the time of the injury; and that claimant has not returned to his usual job. Assuming, without finding, that claimant has a harm to his back, the administrative law judge found that claimant's statements as to how his injury occurred were inconsistent and not supported by the record and, therefore, that he did not establish that a work accident occurred which could have caused his harm. The administrative law judge thus determined that claimant did not carry his burden of establishing a *prima facie* case of a work-related injury under Section 20(a), 33 U.S.C. §920(a), and he denied benefits. Claimant appeals the decision. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in failing to find that claimant's back injury is work-related. A claimant bears the burden of establishing the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated that harm. *See 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 generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes these two elements, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. 33 U.S.C. §920(a); *see Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT).

Claimant asserts that the administrative law judge erred in finding that claimant failed to establish that an accident occurred at work that could have caused his back injury. Claimant argues that his statement that he injured his back lifting a "sub" is consistent with Mr. Taylor's testimony that claimant told him he got hurt when he was picking up something. HT at 88. Thus, claimant argues the record contains substantial evidence to support a finding that an accident occurred. The administrative law judge found that "[n]othing in [c]laimant's medical records support[s] his contention that an

injury occurred at work,"[1] and that claimant's testimony is not credible given his various misrepresentations[2] and the lack of supporting witnesses[3] or documents.[4] Decision and Order at 8. Therefore, although, as claimant states, Mr. Taylor's testimony is consistent with one of his explanations as to how he injured his back, it does not undermine the administrative law judge's finding because it is based on claimant's testimony, which the administrative law judge rationally discredited. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge is entitled to weigh the evidence and to determine the credibility of witnesses. *Id.* As the administrative law judge's rejection of claimant's allegation that he sustained an injury at work is rational and supported by substantial evidence, the Board is bound to uphold his findings. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Consequently, we reject claimant's assertion of error and affirm the administrative law judge's finding that claimant did not establish that an incident or accident occurred at work that could have caused his back injury. *See Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990) (affirming the administrative

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[1]The administrative law judge observed that claimant's medical records do not note any back complaints until August 24, 2004, after his employment had been terminated. CX 3 at 25. Further, although claimant complained of back pain on September 3, 2004, he indicated that the reason for his visit was "personal" as opposed to "work" or "accident" related. *Id.* at 28. Moreover, on September 21, 2004, claimant told his physician that he does not remember any definite injury. *Id.* at 14.

[2]Specifically, the administrative law judge found that claimant reported three different versions of how he injured his back at work. In his recorded statement on September 20, 2004, claimant could not recall any specific event leading to his pain, but he recalled that the pain began in the middle of a hitch which he was able to finish, and that he went back and worked an additional hitch (14 days). EX 1. At his September 12, 2006, deposition, claimant stated that he injured himself while unloading a basket when his feet slipped out from underneath him. And, at the July 14, 2010, hearing, claimant made no mention of the slip; rather, he simply stated that he bent over to pick something up out of a high-sided basket which immediately resulted in his wrenching his back and having to sit down. HT at 53-54.

[3]The administrative law judge found it "difficult to understand that no other worker witnessed [his] injury especially in light of [c]laimant's testimony that others were working on the dock at the time." Decision and Order at 8.

[4]As mentioned, claimant's medical records do not document a work accident, and claimant did not file an accident report form. Decision and Order at 7-8.

law judge's finding that claimant failed to establish that a work accident occurred because claimant's testimony is uncorroborated by witnesses and written reports); *see also Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

Claimant also contends that the administrative law judge erred in failing to invoke the Section 20(a) presumption because claimant's testimony that his job consisted of heavy manual labor establishes that working conditions existed that were sufficient to cause claimant's injury. Claimant did not raise this theory before the administrative law judge, and the administrative law judge did not address it when the case was before him.[5] The Section 20(a) presumption attaches only to claims made. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Amerada Hess Corp. v. Director, OWCP,* 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008). Because claimant failed to first raise this working conditions issue before the administrative law judge, we decline to address it on appeal. *Turk v. E. Shore R.R., Inc.,* 34 BRBS 27 (2000); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Levesque v. Bath Iron Works Corp.*, 13 BRBS 483, *aff'd*, 673 F.2d 1297 (1st Cir. 1981) (table). As we have affirmed the administrative law judge's finding that claimant did not establish that an accident or incident occurred at work that could have caused his injury, and because he cannot now raise the issue of whether working conditions caused a harm to his back, we affirm the administrative law judge's finding that claimant failed to establish a *prima facie* case of a compensable injury.[6] Therefore, we affirm the denial of the claim. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631.

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[5]Claimant's pre-hearing statement and post-hearing brief claim only that claimant was injured in an accident at work.

[6]As claimant has failed to establish a necessary element of a *prima facie* case, employer's assertion that the administrative law judge also erred in failing to find definitively the existence of a harm established is moot.

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

JUDITH S. BOGGS
Administrative Appeals Judge