

BRB No. 92-1902

JON C. BALLAY)
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 Claimant-Petitioner)
)
 v.)
)
 ASSOCIATED PAINTING SERVICES) DATE ISSUED:
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 and)
)
 CNA INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Harold M. Wheelahan, III, New Orleans, Louisiana, for claimant.

Randall L. Kleinman (Hulse, Nelson & Wanek), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-2319) of Administrative Law Judge Richard D. Mills denying benefits 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 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, a sandblaster for employer, alleged that he was involved in a work-related accident on December 4, 1987, when he stepped off the last rung of a spiral staircase and slipped and fell on cables, welding leads, mud, sewage and sand. At the time of the alleged incident claimant was employed by Associated Painting Services, Inc. (APS) as a painter and sandblaster on the offshore rig *Ocean Traveler*, owned by Ocean Drilling and Exploration Company (ODECO). Claimant asserted that this accident caused a cap to be knocked off his tooth as well as an injury to

his back and kidneys. Thereafter, claimant alleged that he went to find Robert Baker, ODECO's medic/safety man, who directed him to his APS foreman, Johnny Robinson. According to claimant, when he related his story to Mr. Robinson, he was informed to hurry and pack his things and that an accident report would be filled out later. An accident report was ultimately filled out prior to claimant's being taken ashore with another painter/sandblaster, Edward Frederick. Upon arriving on shore, both men waited until a driver from APS arrived to pick them up and take them to the office of the company doctor, Dr. Billy Marmande. After discovering blood in claimant's urine, Dr. Marmande sent claimant to Terrebonne General Hospital, where he remained for between nine and eleven days. During his hospital stay, claimant received treatment by Dr. Frank Graffagnino, a urologist. In addition, claimant also received treatment for his back, and a bone scan was performed. Claimant ultimately underwent a fusion at the T12 to L1 level in July 1988.

Claimant sought medical benefits and disability compensation under the Act. A purported agreement between employer and claimant whereby employer was to pay claimant disability compensation based on a compensation rate of \$175 and certain medical benefits was not consummated. A hearing was held before the administrative law judge, the scope of which was limited to determining whether claimant's alleged accident occurred and whether the administrative law judge had jurisdiction to enforce the previously discussed settlement agreement.

The administrative law judge found that the testimony of claimant and his only alleged eyewitness, Edward Frederick, was not credible based on numerous factual inconsistencies and contradictions in the record regarding how the accident occurred, the manner in which claimant fell, and conditions at the site. The administrative law judge thus determined that claimant was not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), because the credible evidence failed to establish that a work-related accident occurred. In light of his determination that the work-related accident did not occur, the administrative law judge found that the issue of his jurisdiction to enforce the purported settlement had been rendered moot.

On appeal, claimant asserts that he is entitled to the Section 20(a) presumption, and that any contradictions in the record were the natural result of memories fading over time, as the hearing was held approximately four years after the accident. Claimant also contends that the administrative law judge erred in ignoring the findings of Dr. Marmande, who examined claimant after he returned to shore on December 4, 1987 and recommended hospitalization, and of Dr. Graffagnino, who performed a cystoscopy while claimant was hospitalized. Employer and carrier respond, urging affirmance.

In order to establish his entitlement to the Section 20(a) presumption, claimant bears the burden of proving not only that he has suffered an injury, but that a work-related accident occurred or working conditions existed which could have caused the harm. See *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant is not aided by the Section 20(a) presumption when seeking to establish either element of his *prima facie* case. See *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988); *Jones v. J. F. Shea Co.*, 14 BRBS 207 (1981).

After careful review of the record, we affirm the administrative law judge's denial of benefits because his finding that claimant failed to establish the accident element of his *prima facie* case is

rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 359. Although the opinions of Drs. Marmande and Graffagnino establish the injury or harm element of claimant's *prima facie* case, they are not relevant to the issue of whether claimant's alleged work accident did in fact occur. In addition, contrary to claimant's assertions, the administrative law judge acted within his discretion in discrediting claimant's account of the accident and that of his alleged eye-witness, Mr. Frederick, based on his reasonable interpretation of their testimony as internally inconsistent. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). In so concluding, the administrative law judge accurately identified discrepancies between claimant's testimony at the hearing on January 23, 1992, and his deposition testimony on December 13, 1988, regarding the manner in which claimant fell and the resultant physical trauma. Decision and Order at 13; Tr. at 67, 68, 76, 77. Moreover, he also properly noted that Mr. Frederick, who by "a strange coincidence" had allegedly been involved in an accident on the same date, at the same place, and allegedly under the same conditions, had provided deposition testimony which contained several versions of claimant's accident, an explanation for the presence of sewage on the deck which differed from claimant's, and an account of his own accident which differed greatly from the ODECO accident report. Decision and Order at 13-15; Cl. Ex. 18 at 16, 19-21, 28, 43, 56-58, 82, 84-86, 126, 127; Tr. at 65, 66, 123.

The administrative law judge also reasonably discredited claimant's account of the alleged accident in light of the numerous factual discrepancies which existed between claimant's and Mr. Frederick's testimony and that provided by other parties regarding how the accident occurred, the manner in which claimant allegedly fell, the extent of his injuries, if any, and the conditions at the alleged accident site. The ODECO project engineer, James Herbert, claimant's APS foreman, Johnny Robinson, the ODECO medic/safety man, Robert Baker, and John Hanson, a student who attended the University of New Orleans with claimant, each provided testimony which contradicted claimant's description of conditions at the accident site and/or indicated that he had related several conflicting versions of the alleged accident. Decision and Order at 13-16; Tr. at 74, 102-104, 123-124, 127-129, 131, 156; Emp. Ex. 3 at 24-28, 31-33. Inasmuch as the administrative law judge's finding that claimant failed to establish the accident element of his *prima facie* case is rational and supported by substantial evidence and claimant has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations, his denial of benefits is affirmed. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge