BRB No. 00-0761

ROBBIE GIROIR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONRAD INDUSTRIES, INCORPORATED	)	DATE ISSUED: April 6, 2001
	)	
and	)	
	)	
ZURICH INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and the Order on Claimant's Motion for New Trial and/or Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

James E. Cazalot, Jr. and H. Edward Sherman (Law Offices of H. Edward Sherman), New Orleans, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits and the Order on Claimant's Motion for New Trial and/or Reconsideration (1999-LHC-441) of Administrative Law Judge Larry W. Price 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipfitter for employer, alleges that a specific work incident occurred on

December 3, 1997, which caused his current back condition. Specifically, claimant testified that he injured his back while carrying a twelve foot piece of angle iron from employer's foreman's shed, located approximately 100 to 150 yards from the ship in which he was working, up a flight of stairs into the ship and, ultimately, down a manhole into a starboard ballast tank. Claimant reported this alleged incident to employer on December 4, 1997, and was thereafter diagnosed as having sustained a herniated disc.

In his Decision and Order, the administrative law judge found that claimant failed to establish that his present back problems are due to an injury sustained during the course and scope of his employment with employer; accordingly, he denied compensation.[1] Claimant thereafter sought reconsideration of the administrative law judge's decision or, alternatively, a new trial. In an Order issued April 4, 2000, the administrative law judge addressed the contentions raised in claimant's motion, but denied the relief requested.

On appeal, claimant argues that the administrative law judge erred in weighing the evidence and concluding that claimant did not suffer a work-related injury on December 3, 1997. Alternatively, claimant asserts that since the administrative law judge issued his decision five and one-half months after the formal hearing, a new trial is warranted so that the administrative law judge could observe claimant's demeanor for a second time. Employer responds, urging affirmance.

After review of the administrative law judge's Decision and Order in light of the evidence of record, we reject claimant's assertion that the administrative law judge erred in finding that his back condition is not work-related. Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See 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); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28

[1]In so finding, the administrative law judge did not address the other unresolved issues before him regarding the nature and extent of claimant's disability, claimant's wage-earning capacity, claimant's average weekly wage at the time of the alleged incident, and claimant's entitlement to medical treatment. Decision and Order at 3.

BRBS 43(CRT) (1994). Once claimant establishes his *prima facie* case, Section 20(a), 33 U.S.C. §920(a), of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In his decision, the administrative law judge stated that inasmuch as claimant established the existence of a back condition and testified that this condition occurred while he was working for employer, claimant was entitled to the benefit of the Section 20(a) presumption. The administrative law judge, citing to employer's evidence which casts doubt on whether the alleged incident as described by claimant in fact occurred, then determined that employer rebutted the presumption. Next, the administrative law judge weighed all of the evidence addressing claimant's assertion that, on December 3, 1997, he carried a twelve foot piece of angle iron from employer's foreman's shed to the starboard ballast tank within the vessel on which he was working.

In the instant case, the administrative law judge, after addressing claimant's testimony in detail, discredited that testimony in concluding that the existence of working conditions as described by claimant on December 3, 1997, did not occur. In rendering this determination, the administrative law judge initially addressed claimant's testimony that Mr. Fontenot, claimant's foreman, specifically ordered him to carry a twelve foot piece of angle iron to his work area in the starboard ballast tank. The administrative law judge found, however, that employer's time sheets indicate that Mr. Land, claimant's witness to his alleged conversation with his foreman on December 3, 1997, was not present at the vessel on that date and that, accordingly, Mr. Land's testimony was of questionable credibility.[2] Next, the administrative law judge acknowledged Mr. Fontenot's testimony that, since he himself suffers from three ruptured spinal discs, he is aware of the dangers associated with heavy lifting and that he had never seen anyone carry a twelve foot piece of angle iron; rather, Mr. Fontenot testified that such pieces would be transported to the starboard ballast tank's access hole by a crane. Mr.

[2]Moreover, the administrative law judge noted that, contrary to claimant's version of events, Mr. Land testified that claimant had cut the angle iron to a length of eight feet, and that the conversation between claimant and Mr. Fontenot occurred prior to Thanksgiving Day. Additionally, Mr. Land testified that he saw, but did not hear, the alleged conversation in question.

Fontenot stated that he could not recall the conversation alleged by claimant to have occurred on December 3, 1997. Lastly, the administrative law judge found claimant's testimony difficult to reconcile with the testimony of Mr. Bailey, employer's superintendent, who testified that while it is common to hand carry items weighing between 30 and 40 pounds, he has never seen a twelve foot piece of angle iron moved by hand. The administrative then credited the testimony of Mssrs. Fontenot and Bailey, and concluded that claimant's testimony regarding the issuance of a specific order to carry a twelve foot piece of angle iron lacked credibility.

Next, the administrative law judge addressed claimant's testimony regarding the alleged act of carrying the angle iron in question. Claimant testified that he was required to hand carry the twelve foot piece of angle iron to his work station within the starboard ballast tank since the main crane for his side of the shipyard was inoperable. In this regard, claimant testified that the only way to access the starboard ballast tank was through a manhole located in an interior hallway of the vessel and that, as there was no light in this ballast tank, he was required to bring a lighting source with him. Contrary to claimant's testimony, the administrative law judge found that employer established that there were multiple cranes as well as cherry pickers available to move angle iron at employer's facility on December 3, 1997, as evidenced by the one-half hour of crane time and nine hours of cherry picker time billed to employer's project on that day.[3] Moreover, the administrative law judge found that employer's project records indicate that prior to December 3, 1997, an access hole had been cut into the side of the vessel so that light and work materials could enter the starboard ballast tank, and that this access hole was enlarged on the day of claimant's alleged work-injury.[4] As he found employer's witnesses and documentary evidence to be credible, the administrative law judge concluded that claimant's inability to remember the presence of either the cranes or the access hole to the starboard ballast tank "appears to be a deliberate attempt to mislead this Court."[5] *See* Decision and Order at 15.

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[3]The administrative law judge specifically found that employer's billing records were checked daily by both employer and the vessel owner's on-site representative, who apparently had no objections concerning the billing charges set forth for work performed on December 3, 1997.

[4]Regarding this access hole, Mr. McElroy, employer's project manager, testified that in late November 1997 a 4 by 5 foot hole was cut into the vessel's hull for ventilation and ease of access purposes; on December 3, 1997, this hole was enlarged to measure 4 by 8 feet. Furthermore, Mr. McElroy testified that it was not possible to be present in the starboard ballast tank and not be aware of the presence of the access hole cut in the vessel's hull.

[5]For these same reasons, the administrative law judge declined to rely upon the testimony

Based upon the foregoing findings, the administrative law judge concluded that claimant failed to establish the existence of working conditions or an accident on December 3, 1997, which could have caused his back injury. After review of the record, we affirm the administrative law judge's finding because it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. 359. We note that the evidence as to whether the alleged event at work occurred should have been weighed in determining whether the Section 20(a) presumption was invoked. *See Darnell v. Bell Helicopter, Inc.*, 16 BRBS 98 (1984) *aff'd sub nom. Bell Helicopter, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984); *Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981). Any error is harmless, however, as the administrative law judge weighed the relevant evidence. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). As claimant failed to establish either the working conditions claimed, an essential element of his *prima facie* case, or any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, the administrative law judge's denial of benefits is affirmed.

Lastly, we reject claimant's contention that the administrative law judge's decision should be vacated and a trial ordered before a new administrative law judge because of the five and one-half month period between the date of the formal hearing and the issuance of the administrative law judge's Decision and Order. Claimant has not affirmatively established that this delay resulted in prejudice to him. *See Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

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of Mr. Canty, who testified that he witnessed claimant carrying the angle iron up a flight of stairs onto the vessel on December 3, 1997.

Accordingly, the Decision and Order - Denying Benefits and the Order on Claimant's Motion for a New Trial and/or Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge